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DIARY FOR OCTOBER.

1. Wednesday...Clerk of Municipality to deliver Assessment Rolls to Collector.
4. Saturday. . ..Last day for notice of trial York & Peel Assizes.
5. SUNDAY.....16*th Sunday after Trinity.*
6. Monday . . County Court and Surrogate Court Term begins.
7. Tuesday.....Chancery Ex. Term London & Belleville com Last day for notice
11. Saturday . . Co Court & Surrogate Ct. Term ends. [Hamilton and Belleville.
12. SUNDAY.....17*th Sunday after Trinity.*
13. Monday..... .York and Peel Fall Assizes.
14. Tuesday.....Chancery Ex. Term Brantford and Kingston com Last day for
19. SUNDAY .....18*th Sunday after Trinity.* [notice Barrie and Ottawa.
21. Tuesday .... .Ch Ex. Term Hamilton and Brockville com Last day for notice
26. SUNDAY.....14*th Sunday after Trinity.* [Goderich and Cornwall.
28. Tuesday .....Chancery Ex. Term Barrie and Ottawa commences.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

OCTOBER, 1862.

LIABILITY OF MASTER FOR ACCIDENTS TO SERVANT.

The branch of law which we propose to consider is one of modern growth. It partakes of refinements unknown to our ancestors. Owing to the increase of labor-saving machinery, and consequent use of machinery, accidents to workmen are much more frequent than formerly. Owing to this circumstance, combined with the change of law which allows the representative of a person killed by accident to sue for damages, actions to recover damages for accidents resulting in injuries to the body are become very numerous.

Most accidents are attributable to some cause or combination of causes. In the case of an employee injured by accident, the cause may be—

1. Neglect of fellow servant.
2. Neglect of master.
3. Neglect of person injured.

As to these, severally.

1. *Neglect of fellow servant.*

The mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is bound to provide for the safety of the servant, in the course of his employment, so far as he reasonably can. The servant is not bound to risk his safety in the service of the master. If he accept service, he undertakes to run all the ordinary risks incident to it. The negligence of a fellow-servant in the course of common employment, is held to be a risk of that description. When we use the term "servant," its application is not to be restricted to that of a menial. It extends to tradesmen and contractors. It extends not only to persons directly employed by the master, but to persons indirectly employed, such as persons employed by sub-contractors, provided all are employed for one and the same common work: (*Wiggett* v. *Fox*, 11 Ex. 832). A person who volunteers to assist the servants of defendant is no better position than a hired servant, so far as his remedy against the master for injuries received while in employ of the master is concerned: (*Degg* v. *Midland R. Co.*, 1 H. & N. 781; *Potter* v. *Faulkner*, 10 W. R. 93; *Abraham* v. *Reynolds*, 5 H. & N. 143). It would be absurd to hold the master liable to the servant for the neglect of a fellow-servant in putting the former into a damp bed; for the negligence of the cook in not properly cleaning copper vessels used in the kitchen; of the butcher for supplying meat injurious to health; of the upholsterer for supplying a crazy bedstead; or to hold the builder liable for the falling of a brick by a bricklayer, an axe by a carpenter, or stone by a mason. The servant must use ordinary diligence to protect himself from misadventures of this kind; and if from no fault of the master he suffers, the master is clearly not responsible.

The first case to which we shall advert is *Priestley* v. *Fowler*, 3 M. & W. The declaration stated that plaintiff was a servant of defendant in his trade of a butcher; that defendant had desired plaintiff to convey some meat in a van driven by a fellow-servant; that the van broke down, whereby the plaintiff was injured, &c. The action was held not to be maintainable. The plaintiff's right to recover was rested on the supposed obligation of the master to supply a proper van, or to take care that it was not overloaded; but the court held that the master was not liable for damage to the servant, arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it. In conclusion the court said—"To allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of those who serve him; and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master could possibly afford."

So where a servant of a railway company in the discharge of his duty as such, was proceeding in a train under the guidance of others of their servants, through whose negligence a collision took place, and he was killed, the action

was held not to be maintainable: (*Hutchinson* v. *The York Newcastle and Berwick Railway Company*, 5 Ex. 343.)

So where the deceased, a workman employed in the construction of the Crystal Palace, London, was killed through the neglect of a fellow-workman in letting fall an instrument called a "rymer:" (*Wigget* v. *Fox et al*, 11 Ex. 832.)

So where the servants of defendants, a railway company, were turning a truck on a turn-table, and a person assisting them was killed through the negligence of the servants of the defendants, in propelling a steam engine against him: (*Degg* v. *The Midland Railway Company*, 1 H. & N. 773.)

So where plaintiff, an engineer in the service of defendants, a railway company, engaged in running a passenger train on their line, in consequence of the neglect of a switchman, on the same line of railway, was precipitated off the line and thereby injured: (*Fearwell* v. *The Boston and Worcester Railway Company*, 4 Metcalfe 449.)

So where deceased, a miner in the employ of a mining company, was killed, while ascending a shaft of the mine, through the negligence of a fellow-servant, whose duty it was to attend to certain machinery by which the miners were let down into, and drawn up from, the mine: (*The Barton's Hill Coal Company and Reid in the House of Lords*, 4 Jur. N. S. 767.)

2. *Neglect of master.*

The neglect of the master may be either neglect to hire competent servants—to provide safe machinery—or to keep machinery in repair. The master is not under all circumstances excused from the consequences arising from the act of a fellow-servant or workman. He is only so excused when he hires competent servants. The rule is thus stated by Baron Alderson. The master is not in general responsible for an injury to a servant arising from the neglect of a fellow-servant, "when he (the master) has selected persons of competent care and skill:" (*Hutchinson* v. *The York, Newcastle and Berwick R. Co.*, 5 Ex. 351.) If the servant who caused the injury were incompetent to discharge his duty, and the injury arose from that incompetency, there is strong ground for holding the master responsible: (*The Barton's Hill Coal Company and Reid*, 4 Jur. N. S. 767). The master to discharge himself must shew at least that he used reasonable diligence in the selection of the servant: (*Tarrant* v. *Webb*, 18 C. B. 796; *Wigmore* v. *Tay*, 5 Ex. 354; *Potts* v. *The Port Carlisle Dock Company*, 2 L. T. N. S. 283.)

The question whether or not the fellow-servant or workman was competent or incompetent may become quite immaterial, if it be shewn that the machinery used was to the knowledge of the master defective, either by reason of improper construction or improper use, and that such defect produced the accident. In this case, however, the allegation of knowledge on the part of defendant must be alleged and proved or the action cannot be sustained.

Thus, where plaintiff engaged with defendant to serve on board defendant's ship as a common seamen on a special voyage, and alleged that the vessel was leaky and unseaworthy, by which the plaintiff became unwell and sustained damage—held that the declaration, in the absence of an allegation of knowledge on part of defendant, was bad: (*Couch* v. *Steel*, 3 El. & B. 402.)

So where defendant had erected a scaffold for his own use, and afterwards contracted with plaintiff to pull down a certain wall, in doing which the use of the scaffold became necessary, and one of the putlogs or cross supports of the scaffold was rotten and broke, whereby plaintiff was thrown to the ground—in the absence of proof of knowledge on part of defendant, the action was held not to be maintainable: (*McCarty* v. *Young*, 6 H. & N. 329.)

The knowledge may be brought home to the master by various circumstances, the strongest of which is personal interference: (*Ormond* v. *Hall*, 1 El. B. & E. 102.)

Thus, where defendant had employed a laborer to erect the scaffold upon which plaintiff worked. The materials of the scaffold were in a bad condition. The laborer broke several of the putlogs in trying them. One of the defendants told him to break no more—that the putlogs would do very well. This was held to be evidence to go to the jury: (*Roberts* v. *Smith*, 2 H. & N. 213).

So where plaintiff was employed in the defendant's coal pit, and in the course of his employment received an injury caused by a defect in the machinery, and it was shown that one of the defendants personally interfered in the management of the colliery (*Mellors* v. *Shaw*, 7 Jur. N. S. 845).

3. *Neglect of person injured.*

It is necessary, as a general rule, to establish not only knowledge of master but ignorance of the servant. The master cannot be held liable for an accident to his servant, simply because the master knows that machinery is unsafe, if the servant has the same means of knowledge as the master (*Williams* v. *Clough*, 3 H. & N. 258). If, after such knowledge, the servant continues in the employment, his continuance, if not negligence, is acquiescence, or perhaps more, a willingness to run all risks with his eyes open (*Assop* v. *Yates*, 2 H. & N. 768; *Skipp* v. *Eastern Counties Railway Company*, 9 Ex. 223). This rule, however, has of late been qualified. In a case where machinery by act of Parliament is required to be protected, so as to guard the persons working from danger, where a servant continues in the employment, entering upon it when in a state of safety, and in consequence of danger

accruing from the protection being decayed or withdrawn, if the servant continues, but complains of the want of protection, and it is promised to him from time to time that it shall be restored, during that period the master is considered as taking upon himself the burden of the risk (*Holmes* v. *Clarke*, 6 H. & N. 349). But if the servant, knowing the machinery to be unsafe, contrary to the express command of the master, use it or otherwise interfere with it, he is without remedy if an accident occur resulting in injury to him (*Coswell* v. *Warth*, 5 El. & B. 849). So if it can be said that the servant, by his own neglect, in any manner contributed to the accident which caused the injury (*Dynes* v. *Leach*, 26 L. J. Ex. 221; *Senior* v. *Ward*, 28 L. J. Q. B. 139).

Such is the law bearing upon the question as to the liability of the master for injuries sustained by a servant while in his employment. There is some difference of opinion as to its reasonableness. There are those who contend that the servant is not sufficiently protected by it. Indeed during last session of the Imperial Legislature, a bill was introduced to extend the liability of the master, where the accident is caused by the default of a fellow-servant; where the accident is caused to the servant by default of tackle or machinery, though the master is not proved to have had knowledge of it; and where the accident is caused to the servant by the negligence of the master in not furnishing proper machinery, the servant having undertaken or continued the work with a knowledge thereof.

This bill did not become law, and if ever again introduced must meet with a strong and steady opposition from the great manufacturers of England, every one of whom is interested in maintaining the law without amendment. We do not mean to discuss the necessity for amendment; we are content at present to deal with the law as we find it.

COUNTY COURT JUDGES IN UPPER CANADA.

The *Solicitors' Journal*, after giving a long extract from our article in the *Law Journal* for August on the Impeachment of County Court Judges, proceeds as follows:—

"We are not aware what is the precise rank or what are the special functions of county court judges in Canada; but assuming that they hold the same relative rank there as they hold in England, we cannot altogether agree with the view taken by our Canadian contemporary. So far as his remarks apply to the constitution, to the style or title of this "Court of Impeachment," and to its peculiar jurisdiction and procedure, we entirely concur. Whatever offence is worthy of "impeachment" ought not to be prosecuted except pursuant to a vote of the Legislature; and in that case its prosecution should not depend upon the will or the ability, pecuniary or otherwise, of any individual. But unless Canadian county court judges be more important personages than English functionaries of the same title, there seems to be no reason why they should not be removable in like manner. In England the Lord Chancellor, or the Chancellor of the Duchy of Lancaster, within their several jurisdictions have power to remove any county court judge for either 'inability or misbehaviour.' No farce of an 'impeachment,' is required or allowed. A great and perhaps somewhat arbitrary power is intrusted to a great functionary upon the faith of its judicious exercise under the corrective influence of public opinion, and the system has not been found unsatisfactory. It appears to us that the Legislature of Upper Canada might wisely entrust to the Provincial Chancellor, if not to the Governor-General, a similar power, and that the sooner it abolishes its Court of Impeachment the better it will be for its own reputation and for that of its judiciary.

Our cotemporary is wrong in the assumption that our county court judges rank no higher than county court judges in England. They are, we beg to say, "much more important personages than English functionaries of the same title." Our county courts are courts of record, having the like practice and mode of procedure as the Superior Courts and are inferior to the Superior Courts of Common Law only in amount of jurisdiction. They have jurisdiction in all personal actions (excepting libel, slander, criminal conversation and seduction) where the debt or damages claimed do not exceed $200 (£50) and in all cases relating to debt, covenant, and contract, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant to $400 (£100). In point of territorial jurisdiction, our county courts have authority throughout the whole of Upper Canada quite as much as the Superior Courts. Besides, the judges hold office during good behaviour in like manner as do the judges of the Superior Courts.

These are our reasons for treating an erring county court judge, if any such, with more consideration than a defaulting bank clerk or wayward errand-boy.

FEES TO PUBLIC OFFICERS.

Shortly after the article on this subject, which appeared in the last number of the *Law Journal*, was written, *Ex parte Poussett and the Corporation of the County of Lambton* was decided in the Queen's Bench. The case is not reported. A note of it appears in the proper place in this number. The court held that it is the duty of county corporations to pay, in the first instance, all accounts for fees properly payable to officers concerned in the administration of justice, and afterwards to look to the Government to be reimbursed. The court also held that such accounts must be audited by the magistrates in sessions before payment can be exacted. The decision is of much interest not only to the public officers concerned but to county councils.

JUDGMENTS.

QUEEN'S BENCH.

Present: McLEAN, C. J.; BURNS, J.; HAGARTY, J.

September 22, 1862

Regina ex rel. Secker v. *Paxton.*—Rule nisi for mandamus discharged with costs.

Ex parte Poussett and the Corporation of the County of Lambton.—Application for a mandamus. *Held* that county auditors have nothing to do with the accounts of the clerk of the peace in the first instance. His accounts must be audited by magistrates in sessions. Rule discharged, but without costs.

Great Western Railway Company v. *The Desjardins Canal Co.*—Rule absolute to rescind order of McLean, C. J., and leave given to defendants to plead *non est factum* and release, on payment of all costs.

Sloane v. *Creasor.*—Action against sureties of Division Court bailiff. Appeal from decision Judge County Court of Simcoe. Dismissed with costs.

Moore v. *Hynes.*—Action on covenant against incumbrances. Question whether sewerage rate in the city of Toronto a charge on the land or on the owners in respect thereof. *Held* not to be a charge on the land. Judgment for defendant.

The Queen v. *Sheridan.*—Appeal from decision of Quarter Sessions refusing new trial. Dismissed with costs.

Toda v. *Snyder.*—Judgment reversed and repleader awarded.

Ryan v. *Miller.*—Action for seduction. Rule absolute to enter nonsuit.

Reed v. *Draper.*—Rule absolute for new trial on payment of costs and payment of £75 into Court in ten days, else rule discharged.

Present: McLEAN, C. J.; BURNS, J., HAGARTY, J.

September 27, 1862

Coulson v. *Parke.*—Rule discharged.

Hamilton v. *McDonald.*—Rule discharged on appeal.

Moffatt v. *White.*—Stands till next term.

In re Provisional Warden County of Bruce.—Stands till next term.

Austin v. *Corporation County of Simcoe.*—Rule disharged with leave to plaintiff to appeal, or within a fortnight to accept a nonsuit.

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; MORRISON, J.

September 22, 1862.

Carveth v. *Fortune.*—Rule absolute for new trial without costs, on the ground of rejection of evidence.

Haskill v. *Fraser.*—Rule absolute to enter nonsuit.

Turley v. *Rosebush.*—Appeal from County Court dismissed with costs.

Ockerman v. *Blacklock.*—Appeal allowed without costs. *Semble* county judges should return copies of their opinions, not simply "rule discharged or rule absolute."

Howell v. *Allport.*—Postea to plaintiff.

McCance v. *Bateman.*—Appeal allowed and nonsuit set aside.

Sills v. *O'Halloran.*—Appeal allowed. Rule absolute to enter nonsuit.

Shaw v. *Shaw.*—Appeal dismissed with costs.

Caverill v. *Orris.*—Rule absolute for nonsuit.

Van Every et al. v. *Sims.*—New trial on payment of costs, as learned Chief Justice not satisfied with verdict.

Cameron et al. v. *Stevenson.*—Rule absolute.

Shipman v. *Grant.*—Rule discharged, and judgment for defendant on demurrer.

Trustees St. Andrew's Church v. *Great Western Railway Co.*—Rule absolute to appoint an arbitrator.

Caspar v. *Franklin.*—Rule discharged.

Smart v. *The Detroit and Niagara River Railway Co.*—Rule discharged with costs.

Modeland v. *McGuire.*—Judgment for plaintiff on demurrer, with leave to amend on terms.

Bryce v. *Beattie.*—Appeal allowed.

Thompson v. *Falconer.*—New trial without costs.

Don v. *Ogilvy.*—Postea to plaintiff.

Don v. *Law.*—Postea to plaintiff.

Tait v. *Lindsay et al., executors, &c.*—Rule discharged.

Graham v. *Brown.*—Rule discharged.

Dollery v. *Whaley.*—Stands enlarged.

Robinson v. *Potter.*—Rule discharged with costs.

In re Bright and the City of Toronto.—So much as relates to 19th section of by-law absolute with costs.

Metcalf v. *Widderfield.*—Rule discharged with costs.

Titus v. *Durkee.*—Rule absolute to enter verdict for defendant.

Luke v. *Perry.*—Appeal dismissed with costs.

Morris v. *Cameron.*—Judgment for defendant on demurrer.

Regina v. *Town of Paris.*—Judgment on demurrer for the Crown.

Gillespie v. *The City of Hamilton.*—*Nolle prosequi* to be entered according to agreement of parties.

In re Registrar of North Waterloo.—Rule absolute for mandamus

Griffin v. *Judson.*—Appeal allowed. New trial.

Present: DRAPER, C. J.; RICHARDS, J.; MORRISON, J.

September 27, 1862.

Ireson v. *Mason.*—New trial without costs, on ground of misdirection.

English v. *Clark.*—Appeal allowed. Rule for new trial in court below discharged.

Carry v. *Wallace.*—Appeal dismissed with costs. No proof of contract express or implied.

Baldwin v. *Elliott.*—Rule absolute for new trial. Costs to abide the event.

Young v. *Edmondstone et al.*—Appeal dismissed with costs.

Regina v. *Ewing.*—As defendant tried a second time improperly court refuse to deliver judgment.

Hodgins v. *Hodgins.*—No judgment. Stands.

Fisher v. *Jameson.*—Stands.

Carruthers v. *Reynolds.*—Stands.

NEW COMMON LAW RULE.

TORONTO, Trinity Term, 26 Victoria.

It is ordered, that in all appeals from the County Courts, in all cases where the bond required by the sixty-seventh and sixty-eighth sections of the County Courts Act is executed, perfected and produced to the Judge of the County Court whose decision is appealed from, as required by the said statute, on or before the first day of the term of the Court appealed to next after the date of such bond, the case appealed shall be set down to be heard on the first or second paper day of such term; and that if the case be

not so set down, the appeal shall be considered and treated as abandoned, and the party in whose favor the decision of the court below has been pronounced shall be at liberty to proceed in the cause as if no proceeding to appeal the same had been taken.

(Signed) A. McLean, C. J.
Robert E. Burns, J.
John H. Hagarty, J.
W. H. Draper, C.J. C.P.
Wm. B. Richards, J.
Joseph C. Morrison, J.

NEW TARIFF OF FEES FOR THE CLERKS OF THE PEACE.

Trinity Term, 26th Victoria,
5th September, 1862.

Whereas, the Table of Fees confirmed by the Judges of the Court of Queen's Bench, on the 15th November, 1845, applicable to Sheriffs, Clerks of the Peace, Constables, and Criers, for services rendered in the administration of Justice, and for other County purposes, has become inapplicable in many respects to the duties as now performed by the respective Clerks of the Peace for the several Counties of this Province, and new duties have been assigned to the Clerks of the Peace since the making of the said Table:

And whereas, by the consolidated Acts of Upper Canada, ch. 119, sec. 2, the said Table of Fees was to continue until otherwise appointed: and power was thereby given to the Chief Justices and other Judges of the Superior Courts of Common Law, at Toronto, from time to time, as occasion requires, by rule or rules by them to be made in Term-time, to appoint the fees to be taken and received by such Sheriffs, Coroners, Clerks of the Peace, Constables and Criers, for such services as aforesaid:

First. — It is ordered, under and by virtue of such authority, that with respect to the duties performed by the several Clerks of the Peace, in the several Counties of this Province, the Table of Fees in the Schedule hereto annexed, shall be substituted for and taken in lieu of such Table of Fees.

Second —That the Table of Fees in the Schedule hereto annexed, shall not be construed as interfering with the Orders made by the Judges of the Court of Queen's Bench, on the 15th November, 1845, further than as an alteration of the Fees to be taken by the Clerks of the Peace, for the several services stated in the Schedule hereto annexed

(*Signed,*) Arch'd McLean, C.J.
Wm. H. Draper, C.J., C. P.
Robert E. Burns, J.
Wm. B. Richards, J.
John H. Hagarty, J.
Jos. C. Morrison, J.

SCHEDULE OF FEES.

To be taken and received by the Clerks of the Peace in this Province, in lieu of the Table established on 15th November, 1845.

	To be paid out of the Co. Fund.	To be paid by party applying.
	$ cts.	$ cts.
1. For drawing Precept to Summon the Grand and Petit Jury, attending Justices to sign same, and transmitting to the Sheriff	4 00	
2. Attending each general Quarter Sessions	6 00	
3. Making up Record of each general Quarter Sessions	10 00	
4 Notice of every appointment of a Constable, under 23 Vict., ch. 8, or other officer appointed by the Justices in Sessions, and notice of any order made by the Quarter Sessions, when required to be notified to any person or party	0 20	
5. Subpœna	0 50	0 50
6. Bench Warrant	1 00	
7. Every Recognizance of the Peace for good behaviour	1 00	
8. For discharging the same	0 50	
9. Making up Estreats of each Session	1 00	
10. Every allowance of Certiorari (to be paid by the party applying)		1 00
11. Furnishing to Sheriff and Coroners revised lists of Constables, whenever ordered to be done by the Justices in general Quarter Sessions	1 00	
12. Reading any Statute or public Proclamation, when required to be done by law	0 25	
13. Copies of Depositions or Examinations furnished to Prisoners, Defendants, or their Counsel, when required, each folio of 100 words (to be paid out of the County funds, or by the party applying, according to the nature of the case)	0 05	0 05
14. Receiving, filing, and reading each Presentment of the Grand Jury	0 50	
15. For copy thereof forwarded to the Government, or to the County Council, when directed by the Quarter Sessions	0 50	
16. Arraigning each Prisoner or Defendant indicted, (to be paid out of the County funds, or by the party applying, as the case may be)	0 50	0 50
17. Empannelling and swearing the Jury in every case, whether criminal or otherwise, where by law a trial by Jury is to be had at the Quarter Sessions, and when no fee is fixed by statute: (to be paid out of the County funds, or by the party, as the case may be)	0 50	0 50
18 Swearing each Witness upon any trial by a Jury, or to go before the Grand Jury: (to be paid out of the County funds, or by the party, as the case may be)	0 20	0 20
19. Filing each Exhibit on a trial: (to be paid out of the County funds, or by the party, as the case may be)	0 08	0 08
20. Every Subpœna Ticket, or copy of Subpœna, when necessary: (to be paid out of the County funds, or by the party applying, as the case may be)	0 20	0 20
21. Charging the Jury with the Prisoner or Defendant, upon each indictment: (to be paid out of the County funds, or by the party, as the case may be)	1 00	1 00

	To be paid out of the Co Fund	To be paid by party applying.
	$ cts.	$ cts.
22. Receiving and recording each Verdict of a Petit Jury, in any case of trial by Jury, (to be paid out of the County funds, or by the party as the case may be)	0 50	0 50
23. Recording each Judgment or Sentence of the Court upon a Verdict or Confession, to be paid out of the County funds, or by the party, as the case may be)	0 50	0 50
24. Making out and delivering to the Sheriff a Calendar of the Sentences at each Court	1 00	
25. Certified copy of Sentences sent with the Prisoners to the Penitentiary, after each Session	0 50	
26. Making up Record of Conviction or Acquittal, in any case where it may be necessary: (to be paid out of the County funds, or by the party applying, as the case may be,) per folio of one hundred words	0 10	0 10
27. Every Copy or Extract of a Record or Paper of any kind, required to be made by Law, or by Order of the Justices in Sessions, or for the Information and use of the Government, when required, and where no charge is fixed by law—if the same shall be less than 10 folios of one hundred words each	1 00	1 00
28. If above 10 folios, then for each folio	0 10	0 10
29. Discharging any Prisoner by Proclamation	0 50	
30. Drawing bill of Costs, including taxation (to be paid by the party), and filing the same where necessary to be made and filed, as in cases of Assault, Nuisances or the like, and in Appeals		0 50
31. Drawing out and taking each Recognizance to appear, either of Prosecutor, Defendant, or Witness	0 50	0 50
32. Calling parties on their Recognizance, and recording their non-appearance, for each person called: (only to be charged where the parties do not answer)	0 25	0 25
33. Drawing order of the Justices to Estreat and put in Process: (on the whole list)	0 50	
34. Entering any Order of Sessions, or of the Chairman with two Justices, to remit any Estreat, and recording an Entry of the same: (to be paid out of the County funds, or by the party relieved, as may be ordered)	0 25	0 25
35. Entering and Extracting upon a Roll in duplicate, the fines, issues, amerciaments, and forfeited Recognizances, recorded in each Session, making Oath to the same, and transmitting to the Sheriff	2 00	
36. Making out and delivering to the Sheriff the writ of *fieri-facias* and *capias* thereon.	0 50	
37. Making out and certifying copy of Roll and return of the Sheriff, and transmitting it to the Receiver-General	1 00	
38. Making up Book of Orders of Sessions, declaring the limits of the Division Courts, and entering the times and places of holding the Courts	1 00	
39. Making out and transmitting a copy thereof to the Government	1 00	
40. Making out and transmitting copies (with letter to the Clerks of each Division Court, of the divisions made by the Q Sessions,	1 00	
41. Drawing Orders of Sessions for altering the limits of Division Courts	1 00	
42. Making out and transmitting copies of such Orders to the Government	0 50	
43. Making out and transmitting copies of such Orders to each Division Court affected by the alteration	0 50	
44. For each copy of Schedule of the Division Courts, with the order of Sessions, for publication	0 50	
45. For every Search under three years: (to be paid by the party making the search).		0 20
46. For the same extending over three years.		0 50
47. For every Certificate required of proof of a Deed, to be paid by the party applying for the same		1 00
48. For every other Certificate required by law or by order of the Sessions, to be given, where the same is under five folios: (to be paid out of the County funds, or by the party applying for the same, according to the nature of the case)	0 50	0 50
49. For the same, if more than five folios, per folio	0 10	0 10
50. Copying orders of Court, and causing same to be published, where it is requisite, for each order, exclusive of the expense of publication	0 50	
51. Receiving and filing affidavit of Bastardy, to be paid by the party producing it		0 25
52. Receiving and filing each Tender for any public work, or supply, or printing, or other service	0 25	
53. Making out a list of the several tenders on each occasion, as they are opened, specifying the names, prices, and other particulars, and filing the same, when required to be done by the Justices	0 50	
54. Drawing Bonds or Agreements for the delivery of articles, or for doing the work for the Gaol or other County purposes, and attending execution, when required by the Justices	1 00	
55. Receiving and filing accounts and demands at the General Quarter Sessions, preferred against the County, in each Session, numbering them, and submitting them for audit, and making out the cheques	4 00	
56. Making out and delivering lists of orders on the Treasurer, made at each Court of Quarter Sessions	2 00	
57. Making out and transmitting to the Inspector General, a return or Schedule of all Convictions which have taken place before any Justice or Justices, or before the Court, each list	1 00	
58. Making out the annual account to be laid before the Grand Jury at the Quarter Sessions (*vide Consol. Stat. U. C. ch.* 122), of the sum necessary to be provided for the maintenance of insane persons	1 00	
59. For every report or return required by Statute, or by the Government, where no remuneration has been provided by this Table, or Statute	1 00	
60. Making and transmitting a return to the Government of Justices and Coroners who have taken the Oaths, when required to be done, for each return	1 00	

	To be paid out of the Co. Fund	To be paid by party applying
	$ cts.	$ cts.
61. Drawing every special Order of the Court of Quarter Sessions, necessary to be communicated to any party, and entering it on Record	0 50	
62. Letter, and transmitting or delivery to the party interested or affected thereby..	0 25	
63. Swearing each party to an Affidavit, where no charge is elsewhere provided for it: (to be paid out of the County funds, or by the party for whom the Affidavit is sworn, according to nature of case)	0 20	0 20
64. Causing notice to be published of any special or adjourned Sessions, when directed by the Chairman of the Quarter Sessions, or other two Justices, so to do: (exclusive of the amount paid the printer for publication)	1 00	
65. Sending notice of any such Session to the Justices individually, when it may be directed by the Chairman, or other two Justices, for each notice	0 10	
66. Attending each adjourned or Special Sessions, and making up Record thereof	2 50	
67. Receiving and filing Notices of Appeal, and the Appeal from any Judgment or Conviction by one or more Justices, where an Appeal to the Quarter Sessions is given by law: (to be paid out of the County funds, or by the party appealing, as the case may be)	0 25	0 25
68. When the Appeal called on, reading the Conviction, Notice of Appeal, and Recognizance: (to be paid out of the County funds, or by the party appealing, as the case may be)	0 50	0 50
69. For all other Services upon the trial of such Appeal case, when tried by a Jury, including the receiving and recording the Verdict, the same charges as in ordinary Criminal Trials: (to be paid out of the County funds, or by the party, as the case may be)		
70. Issuing Process to enforce the Order of the Court in any Appeal case: (to be paid out of the County funds, or by the party, as the case may be)	1 00	1 00
71. Making out Warrant of Distress or Commitment, in any case where no fee is specially assigned therefor in any Statute, or in this Table	1 00	
72. Drawing certificate of approval by the Justices in Sessions, of sureties tendered by the Sheriff: (to be paid by the Sheriff)		0 50
73. Administering Oaths to any Public Officer, when authorised so to do: (to be paid by the Officer)		0 25
74. Receiving and filing each Oath of Qualification of a Justice of the Peace	0 25	
75. All Letters written to the Government, all Letters written by direction of the Chairman, or of the Justices in Sessions, to Justices, Coroners, or Constables, or others, upon special business connected with the administration of Justice, or County purposes	0 25	
76. For distributing the Statutes to the Justices and County officers, or others, when directed by the Statute or the Government so to do, and taking receipts therefor from each Justice or Officer	0 10	
77. For accounting to the County Member for the copies of Statutes not called for by the Justices and County Officers, and delivering the same to him, whenever such duty shall be required by Statute, or by the Government—and no other fee allowed	1 00	
78. For procuring and supplying to Clergymen and Ministers all Books and Forms required under the Consol. Acts, U. C., ch. 72. for each Book with the necessary set of Forms	0 25	
79. For forwarding the Returns directed by the Census Act, Consol. Stat. Can., ch. 23, annually	0 50	
80. For receiving and Filing Voters Lists under the Election Law, Con. Acts, Can., ch. 6, sec. 6, sub-sec. 2, each list	0 25	
81. For attending and producing before County Judge the Duplicate List, when required by the Judge to do so, under sub-sec. 8 of the same	0 50	
82. For filing each List, Return, or other Paper, where no charge is specially provided for, except Accounts and Claims against the County, and papers connected with matters to be charged against private individuals: (to be paid out of the County funds, or by the party for whom the service is rendered, according to the nature of the case)	0 08	0 08

(*Signed,*) A. McLEAN, *C.J.*
WM. H. DRAPER, *C.J., C.P.*
ROBERT E. BURNS, *J.*
WM. B. RICHARDS, *J.*
JOHN H. HAGARTY, *J.*
JOS. C. MORRISON, *J.*

SELECTIONS.

SIR A. McNAB, BART.

The Canadian Bar has recently lost one of its foremost and most patriotic citizens; a man who reflected honour on the legal profession, to which he belonged; a man who, in more than one capacity, so served his Queen that he may fairly be reckoned among the *optimé de patriâ meriti*. Sir Allan Napier MacNab, Barrister-at-law (at one time Prime Minister of Canada), died at Hamilton, on the 8th of August, after a short, but severe illness, at the age of 64.

Allan Napier MacNab was born on the 19th Feb., 1798. His grandfather, Robert Macnab, of Dundurn, Perthshire (who sprung from the ancient Highland family of Machá Nab), was a captain in the 42nd Highlanders, and by his wife one of the Stuarts of Ardvorlich) had issue, a brave officer, Allan McNab, lieutenant in the 3rd dragoons, who went to the province of Canada as aide-de-camp to General Simcoe, when Canada was "a dense and unpeopled wilderness," and ultimately settled there, having married a lady of the noble house of Napier, the daughter of our then Commissioner of the port of Quebec. Of this marriage the subject of our present

notice was the issue. B rn and educated in the colony, he was little more than fourteen years of age when he volunteered to join the grenadiers of the 8th regimen. in the attack on the Americans, when most of the company were killed. After the campaign of 1814 15 he was actually gazetted to an ensigncy in the British Army; but when the reduction in the line took effect in 1816, he found himself without employ, and, being of an active disposition, he repaired at once to Toronto to study law, and in due course of time—we believe about the year 1823—was called to the Canadian bar, at which he practised with considerable success. He now took up his residence at Hamilton, which soon began to feel the effects of his energy and ability, and was gradually raised from a second-rate municipality to a flourishing city. An address presented to him late in life by the members of the Canadian bar placed upon record the high opinion entertained of his honour, ability and integrity among his own profession, and we regret that we have *not space to repeat it here.*

In 1830, Allan MacNab had gained so wide a reputation as a lawyer, a man of business and practical sense, that he was solicited to offer himself as a candidate for the representation of the county of Wentworth, in the Parliament of Upper Canada; and he was successful in his first attempt to enter upon public life. He had not held a seat in the local legislature for many years before he was chosen as speaker of the province, and in that capacity was most actively engaged in 1837-8 in the suppression of the Canadian rebellion, headed by Mr. Papineau, who (it so happened) had been recently elected to the speakership of the Parliament of Lower Canada. Sir F. B. Head, in some of his published works, places on record in full detail the patriotic conduct of Sir Allan MacNab on this occasion; but adds, somewhat sarcastically it must be owned, in reference to the reluctance of the Home Government to bestow on the subject of this memoir any higher reward than *the mere barren honour of knighthood, that the two speakers* fared much alike, for "while the rebel was forgiven, the patriot was forgotten." Nor can the remark be censured as entirely undeserved, or even as a great exaggeration; for Lord Durham not only pardoned the leaders of the outbreak, but even heaped upon them honours which, whether prudently disposed or not, were very strongly grudged by the loyalist party, while their own services were scarcely recognised. We remember, observes a local writer, that a singular scene in the House of Assembly between Sir Allan Macnab and a prominent speaker of the extreme radical party, caused great amusement at the time. A Mr. Simpson, who had married Mr Roebuck's mother, was speaking in favour of M. Girouard, who had been commander of the rebel force at St. Eustache, and whom the Government had appointed Commissioner of Crown Lands. Sir Allan rose, and, bowing to the Speaker, begged leave to ask Mr. Simpson if this was the M. Girouard for whose apprehension a reward of 500*l.* had been offered? Mr. Simpson—"Yes." Sir Allan—"Was he apprehended, and was the reward paid?" Mr. Simpson—"Yes." To whom was the money paid?" Mr. Simpson—"To myself." Sir Allan—"Then if there was no mistake, and if the Government appointed M. Girouard a commissioner, you will of course, return the money?" Mr. Simpson—"Oh no! I have spent it." Sir Allan—"I thought, Mr. Speaker, that these facts might as well come from the hon. member (bowing to him) as the best authority." It is almost superfluous to add that the remark was followed with roars of laughter.

The patriotic conduct of Sir Allan McNab was also exhibited in the seizure of the *Caroline*, which had been sent by some leading Americans to keep open communication between the rebels and the United States. As is well known to every reader of Sir Francis Head and indeed to every one who has perused the parliamentary debates, he set the vessel on fire and sent her over the falls of the Niagara, seizing her at a moment when her crew were ashore. His gallant conduct on this occasion was publicly defended by Lord Palmerston in the lower House, and (if we remember right) by the late Duke of Wellington in the upper House of the Imperial Legislature, and in July 1838 Sir Allan MacNab received, by patent, the honour of knighthood.

When the union between the Legislatures of Upper and Lower Canada was effected, Sir Allan lost his emoluments as Speaker of the Assembly. He, however, took office in more than one subsequent ministry, and in 1856 was appointed to the responsible post of Premier. This office he held under the last year of Lord Elgin's administration as Governor-General, and under the first of that of Sir Edmund Head.

On the 5th Feb. 1858 Sir Allan was created a Baronet of the United Kingdom, thus receiving from Lord Palmerston a tardy, but by no means excessive, reward for public services of more than a quarter of a century in duration. Soon afterwards, on visiting England, he was nominated honorary colonel in the English army and aide-de-camp to the Queen. It was understood that the latter honour was bestowed upon him by her Majesty herself, to mark her sense of his energy and ability in enrolling a militia force in the province of his adoption. He contested Brighton at the last general election, upon moderate Conservative principles but without success.

Sir Allan MacNab was twice married, but as he has left no issue male his baronetcy has become extinct. His first wife, whom he espoused in 1821, was Elizabeth, daughter of Lieutenant D. Brooke, by whom he had a son, who died in infancy, and also a daughter, married in 1849 to Mr. John Salusbury Davenport, a deputy-commissiary-general; his second wife, whom he married in 1831, was Mary, daughter of Mr. J. Stuart, sheriff of Johnstowne district, by whom he has left two daughters both surviving, viz. Sophia, married on the 15th Nov. 1855 to the Right Hon. Viscount Bury, M.P., Comptroller of her Majesty's Household, and formerly superintendent of Indian affairs in Canada; and *Mary Stuart, married in Sept. 1861 to* John George Daly, Esq., son of Sir Dominic Daly, governor of South Australia. Sir Allan leaves also a surviving sister to lament his loss.—*Law Times.*

MR. JUSTICE TALFOURD'S SKETCH OF SIR WILLIAM FOLLETT.

As we announced to our host our intention to depart on the following day, he brought us his record of visitors for the customary inscription of our names; and, turning over the pages, I was startled by the traces of a well-known hand, tremulously indicating the presence of "Sir W. Follett," when on a journey—too late, alas!—in search of renovated strength, in the autumn of 1844. Since then, the calamity which impended over that celebrated lawyer has occurred: what an extinction, how sadly premature, how awfully complete! The contrast between life and death never seemed to me so terribly palpable as in this reminiscence thus awakened; the action of the life had been so fervid, the desolation of the grave was so raylese. Before me lay an expiring relic—for the writer was stricken mortally when he traced it—of a life of the most earnest endeavors and the most brilliant successes—a life loved, prized, cherished, honored, beyond the common lot even of distinguished men—the life of an advocate who had achieved, with triumphant ease, the foremost place in a profession which in its exercise involves intimate participation with the interests, hopes, fears, passions, affections, and vicissitudes of many lives; the life of a politician admired by the first assembly of free men in the world, idolized by partizans, respected by opponents, esteemed by the best, consulted by the wisest, whose declining health was the subject of solicitude to his sovereign—quenched in its prime by too prodigal a use of its energies—and what remains? A name dear to the affections of a few friends—the waning image of a modest and earnest speaker—and the splendid example of success embodied

in a fortune of £200,000, acquired in ten years by the labors which hastened its extinction—are all this world possesses of Sir William Follett. The poet's anticipation, "Non omnis moriar," so far as it indicates earthly duration, has no place in the surviving vestiges of his career. To mankind, to his country, to his profession, he has left nothing; not a measure conceived, not a danger averted, not a principle vindicated; not a speech intrinsically worthy of preservation; not a striking image, not an affecting sentiment: in his death the power of mortality is supreme. How strange—how sadly strange—that a course so splendid should end in darkness so obscure! It may be well, while the materials for investigation remain, to inquire into the causes of success so brilliant and so fairly attained by powers which have left so little traces of their progress. Erskine was never more decidedly at the head of the Common Law Bar than Follett; compared with Follett, he was insignificant in the House of Commons; his career was chequered by vanities and weaknesses from which that of Follett was free; and yet, even if he had not been associated with the greatest constitutional questions of his time, and their triumphant solution, his fame would live by the mere force and beauty of his forensic eloquence as long as our language. But no collection of the speeches of Follett has been made, none will ever be attempted; no speech he delivered is read, except perchance as part of an interesting trial, and essential to its story; and then the language is felt to be poor, the cadences without music, and the composition vapid and spiritless; although, if studied with a view to the secrets of forensic success, with "a *learned* spirit of human dealing," in connection with the facts developed and the difficulties encountered, it will supply abundant materials for admiration of that unerring skill which induced the repetition of fortunate topics, the dexterous suppression of the most stubborn things when capable of oblivion, and the light evasive touch with which the speaker fulfilled his promise of not forgetting others which could not be passed over, but which, if deeply considered, might be fatal. If, however, there was no principle of duration in his forensic achievements, there can be no doubt of the esteem in which they were held or the eagerness with which they were sought. His supremacy in the minds of clients was more like the rage of a fashion for a youthful Roscius or an extraordinary preacher than the result of deliberate consideration; and yet it prevailed, in questions not of an evening's amusement, but of penury or riches, honor or shame. Suitors were content, not only to make large sacrifices for the assured advantage of his advocacy, but for the bare chance—the distant hope—of having some little part (like that which Phormio desires to retain in Thais) of his faculties, with the certainty of preventing their opposition. There was no just ground, in his case, for the complaint that he received large fees for services he did not render; for the chances were understood by those who adventured in his lottery; in which, after all, there were comparatively few blanks. His *name* was "a tower of strength," which it was delighted to know that the adverse faction wanted, and which inspired confidence even on the back of the brief of his forsaken junior, who bore the burden and heat of the day for a fifth of the fee which secured that name. Will posterity ask what were the powers thus sought, thus prized, thus rewarded, and thus transient? They will be truly told, that he was endowed in a remarkable degree with some moral qualities which smoothed his course and charmed away opposition, and with some physical advantages which happily set off his intellectual gifts; that he was blessed with a temper at once gentle and even, with a gracious manner and a social temperament; that he was without jealousy of the solid or showy talents of others, and willingly gave them the amplest meed of praise; that he spoke with all the grace of modesty, yet with assurance of perfect mastery over his subject, his powers, and his audience; and yet they will scarcely recognize in these excellences sufficient reasons for his extraordinary success. To me, the true secret of his peculiar strength appeared to lie in the possession of two powers which rarely coëxist in the same mind—extraordinary subtility of perception, and as remarkable simplicity of execution.—*Sequel to Vacation Rambles.*

SIR MATTHEW HALE.

The following precepts, in the handwriting of Sir Matthew Hale, were found among his papers after his death. It is a code worthy of the learned Judge who rightly observed it.

"That in the administration of Justice, I am entrusted for God, the king and country; therefore, that it must be done rightly, deliberately, resolutely."

"That I rest not on my own understanding or strength, but implore and rest upon the direction and strength of God."

"That in the execution of judgment, I carefully lay aside my own passions, and not give way to them, however provoked."

"That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unreasonable and interruptions."

"That I suffer not myself to be prepossessed with any judgment at all, 'til the whole business and both parties be heared."

"That I never engage myself in the beginning of any cause, but reserve myself unprejudiced 'til the whole be heard."

"That in business capital, though my nature prompt me to pity, yet to consider that there is also a pity due to the country."

"That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment."

"That I be not biased with compassion to the poor, or favour the rich, in point of justice."

"That popular, or court applause, or distaste, have influence in any thing I do, in point of distribution of justice."

"Not to be solicitous what men say or think, so long as I keep myself exactly according to the rules of justice."

"If in criminals it be a measuring cast, to incline to mercy and acquittal."

"In criminals that consist merely in words, when no more harm ensues, moderation is no injustice."

"In criminals of blood, if the fact be evident, severity is justice."

"To abhor all private solicitations, of what kind soever, and by whomsoever, in matters depending."

"To charge my servants not to interpose in any business whatsoever; not to take more than their known fees; not to give any undue precedence to causes; not to recommend counsel."

"To be short and sparing, at meals, that I may be the fitter for business."

LEGAL NOTES AND ANECDOTES.

A bailiff who had been compelled to swallow a writ, rushing into Lord Norbury's court to proclaim the indignity done to justice in his person, was met by the expression of a hope that the writ was "*not returnable* in this court."

Lord Campbell mentions that Lord Erskine, when Lord Chancellor, in one of his judgments, observed, "Lord Coke considers the word *lunaticus* as by no means material, classing it with *amens* and *demens*, and there is no doubt that the moon

has no influence over lunatics;" and he notices that Vesey, jun., the reporter, represents this as a point of law decided *by Lord Erskine, and puts in the margin of his report* "*In* cases of lunacy, the notion that the moon has an influence is erroneous."

An old English statute commenced by an enactment relating to the admission of attorneys, and finished by prohibiting the importation of horned cattle.

A few years ago, a learned M. P. brought in a bill with the double object of providing public prosecutors for England, and making it a statute offence for a servant to steal his master's corn for the purpose of feeding the master's horse.

Sir Matthew Hale did not extend his supremacy over the entire See of the Criminal Law; and therefore, when Lord Campbell writes of his History of the Pleas of the Crown, that it is a "*complete* digest of the Criminal Law as it existed in Sir M. Hale's day," he must be understood as expressing, in an equitable sense, that what was intended to be done was done.

It has been said of Blackstone's Commentaries that they have been so often patched, that they will soon resemble Sir John Cutler's *silk* stockings, from which every particle of silk had been displaced by darnings of worsted.

It was pleaded on behalf of a Hundred charged with a loss incurred by robbery on Gad's Hill, that time out of mind, it had been customary to rob upon Gad's *Hill*.

Kelyngs reports:—"At the Lent Assizes for Winchester (18 Car. II.) the clerk appointed by the bishop to give clergy to the prisoners, being about to give it to an old thief, I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived *the prisoner never looked on the book at all*; and yet the bishop's clerk, upon the demand of "*legit* or *non* legit?" answered "legit." And thereupon I told him I doubted he was mistaken, and had the question again put to him; whereupon he answered again, something angrily, "*legit*." Then I bid the clerk of assize not to record it, and I told the parson that he was not the judge whether the culprit could read or no, but a ministerial officer to make a true report to the court; and so I caused the prisoner to be brought near, and delivered him the book, when he confessed that he could not read. Whereupon I told the parson that he had unpreached more that day than he could preach up again in many days, and I fined him five marks,"

A searcher after something or other, running his eye down the index of a law-book through letter B, arrived at the reference "Best—Mr. Justice—his great mind," Desiring to be better acquainted with the particulars of this assertion, he turned to the page referred to, and there found, to his entire satisfaction, "Mr. *Justice Best said he had a great mind* to commit the witness for prevarication."

A translator of Latin law-maxims translated "messis sequitur sementem," with a fine simplicity, into "the harvest follows the seed-time;" and "actor sequitur forum rei," he made "the agent must be in court when the case is going on."

At a sitting of the Dublin Court Exchequer, Baron Richards found it necessary to administer a rebuke to Mr. Whiteside, Lord Derby's Irish Solicitor-General. Mr. Whiteside demanded, in a declamatory manner and in an unusual style, that the court should give its reasons for the course taken in this case, and expressed regret that there was no appeal from its decision. Baron Richards said, he had too much reliance upon the gentlemen of the bar to fear that such a style of addressing the court would be adopted as a precedent. "Mr. Whiteside has referred to the performance of my duty as a Commissioner in the Incumbered Estates Court," said the judge; "he has no right to inflict upon me the odium of his panegyric. I disclaim his comment, and reject his praise."

In the Statutes at Large some funny things may be found. There is one which is not to be brought to book, and must be *given as a tradition of the time when George III. was King*. Its tenor is, that a bill which proposed, as a punishment of an offence, to levy a certain pecuniary penalty, one half thereof to go to his Majesty and the other half to the informer, was altered in committee, in so far that, when it appeared in the form of an act, *the punishment* was changed to whipping and imprisonment, *the destination being* left unaltered.

Bentham was at the trouble of counting the words in one sentence of an Act of Parliament, and found that, beginning with "Whereas" and ending with the word "repealed," it was precisely the length of an ordinary three-volume novel.

The Irish statute-book opens characteristically with "An Act that the King's officers may travel *by sea* from one place to another within *the land* of Ireland."

Many very ancient works have no title-pages, but commence thus, *Hoc Incipit*, &. A gentleman of more ambition than capacity, coming into possession of such a volume, had it very handsomely bound, causing it to be lettered thus: "Works of Hoc Incipit. Rome. 1490."

In a carriage case before the Queen's Bench, Mr. Hawkins had frequently to advert to that description of vehicle called a "Brougham," which he pronounced in proper dissyllabic form. Lord Campbell suggested that the word was as frequently contracted to "broom," which was just as well known, and the use of which would save a syllable. Henceforward Mr. Hawkins called it "broom." Presently the argument turned on omnibuses, and Lord Campbell frequently used the word "omnibus," to which he gave its due length. "I beg your *Lordship's pardon*," *retorted* Mr. Hawkins, "but if your Lordship will call it 'bus,' you will save two syllables, and make it much more intelligible to the witnesses." The learned lord assented to the proposed abbreviation.

Gibson, C. J., delivering the opinion of the court in *Riddle* v. *Weldon*, on the rights of a lodger to exemption from distress, says that *Poin's friend* speaks with "legal precision," when he demands—"Shall I not take mine ease in mine inn?" *

In Rolle's Reports, p. 286, in an action for words, the case is, "*On dit*, Sir Th. Holt had taken a cleaver and stricken his cook upon the head, so that one side of the head fell upon one shoulder, and the other upon the other shoulder, et ne averr que le cook fuit mort; et pur ceo fuit adjudge nemy bon:" the cook's death, after the splitting of his head, being matter of inference only. Mr. Wallace says this case may be commended to Mr. Chitty, who may, perhaps, reconcile the matter of pleading involved in it with the doctrines of Medical Jurisprudence. †

The fisherman in Plautus's *Rudens*, expresses what are common notions of the ignorant in law concerning property *found*:

> Ubi dimisi retem atque hamum, quidquid haesit extraho.
> Meum quod rete atque hami facti sunt, meum potissimum 'st.

The mitigation of punishment in cases of Homicide *se defendendo* is glanced at by Shakspere's Gravedigger, who throws out that Ophelia would not have had Christian burial, but that the Crowner had found her suicide *se offendendo*.

In Manning and Bray's "History of Surrey," the following curious account is given of Mr. Sergeant Davy's early career:—"This gentleman was a most eccentric character. He was a cheesemonger at Exeter; and a sheriff's officer coming to serve on him a process from the Court of Common Pleas, he very civilly asked him to drink some liquor. Whilst the man was drink-

* King Henry IV. (Part I.), Act III. Scene 3. † The Reporters, 183, 3d ed.

ing he contrived to heat a poker, and then asking what the parchment process was made of, and being answered of sheepskin, he told the man he believed it must eat as well as mutton, and recommended him to try. The bailiff said it was his business to serve processes, not to eat them; on which Mr. Davy told him if he did not eat that, he should swallow the poker; the man preferred the parchment; but the Court of Common Pleas (not then accustomed to Mr. Davy's jokes) sent for him to Westminster-hall, read him a serious lecture for contempt of their process, and sent him to the Fleet. From this circumstance, and the conversation of some unfortunate legal man whom he met there, he acquired that taste for the law which the eating a process had not given to the bailiff; and when he was discharged from the Fleet, he applied to the study of it in earnest. He was called to the bar, made a sergeant, and by his humor acquired so much the ear of the court and of the juries, that every one desired to have him as an advocate. He was a great while in very considerable practice; but, not confining his wit to the narrow compass of the courts, the guineas procured in it slipped through his pockets into some other place, and he ended his professional career little richer than he began it." *

An innkeeper recently appeared at the Borough Police Court, on a summons which charged him with having his house open before one o'clock on 19th August, that being "the Lord's day." It was objected by the counsel who appeared for the defendant, that the term "Lord's day" was a misnomer according to the Act of Parliament, which specified "Sunday;" and the objection being sustained by the magistrates, the case was dismissed.

The following entry appears on the court register of the Romford Petty Sessions (in Havering Liberty) for the year 1730, relating to the trial of two men charged with an assault on Andrew Palmer. As a curious illustration of the manner in which justice was administered in country parts in "the good old times," I think it may be interesting to the readers of "Notes and Queries:" "The jury could not for several hours agree on their verdict, seven being inclinable to find the defendants guilty, and the others not guilty. It was therefore proposed by the foreman to put 12s. in a hat, and hustle most heads or tails, whether guilty or not guilty. The defendants, therefore, were acquitted, the chance happening in favor of not guilty."†

In the Court of Queen's Bench, the name of Mr. Charles Dickens having been called, Lord Campbell said, "The name of the illustrious Charles Dickens has been called on the jury, but he has not answered. If his great Chancery suit had been still going on, I certainly would have excused him; but, as that is over, he might have done us the honor of attending here, that he might have seen how we went on at common law."

A very curious document has been issued from the Parliamentary printing-office. It is the bill which has passed the Commons, entitled, "An Act to repeal certain statutes, which are sleeping and not in use," and it is made singular by the fact that, in it are recapitulated numerous samples of ancestral wisdom. One of the statutes provides "that no man shall ride in harness within the realm nor with launcegays." Another says, "the rates of laborer's wages shall be assessed and proclaimed by the justices of the peace, and they shall assess the gains of victuallers, who shall make horse-bread, and the weight and price thereof." A third defines "what sort of Irishmen only may come to dwell in England" (this has been sleeping a very long time); and a fourth is framed to prevent a butcher from slaying any manner of beasts within the walls of London.—*Monthly Law Reporter.*

* Manning and Wray, vol iii p. 456. † Notes and Queries.

DIVISION COURTS.

TO CORRESPONDENTS

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

SPLITTING THE PLAINTIFF'S DEMAND.

(*Continued from page 232.*)

With respect to the bond to the Crown to be given under the Act, the 24th section provides that:

"Every Division Court Clerk and Bailiff shall give security, by entering into a bond to Her Majesty with as many sureties, in such sums and in such form as the Governor directs, for the due accounting for and payment of all fees, fines and moneys received by them respectively by virtue of their respective offices, and also for the due performance of their several duties."

The security bond to be given by officers it will be noticed relates to three things: first, the *accounting* for fees, &c., received by clerks and bailiffs by virtue of their respective offices; secondly, the *payment* of such fees, &c.; and thirdly, for the *due performance* of their several duties. Formerly it was usually referred to the County Judge to settle the amount of the security to be given, without any general rules suggested for his guidance, but of late general direction has been given by the Executive to the effect that the officer is to be bound in a sum double that of ordinary receipts for one year, more or less, at the discretion of the County Judge, and two sureties, each in one half of such amount. The following is the form of bond directed by the Governor:—

"Know all men by these presents, that we, —— —— of ——, Clerk (or Bailiff) of the —— Division Court of the said —— of ——, and —— of ——, are held and firmly bound unto our Sovereign Lady Queen Victoria, her heirs and successors, in manner and in the sums following, that is to say:—the said —— in the sum of —— of lawful money of the Province of Canada; the said —— in the sum of —— of like lawful money; and the said —— in the sum of —— of like lawful money, to be paid to our Sovereign Lady the Queen, her heirs and successors. For which payments, to be well and faithfully made, we severally, and not each for the other, bind ourselves, our heirs, executors and administrators, and each of us binds himself, his heirs, executors and administrators, firmly by these presents. Sealed with our Seals, this —— day of ——, in the year of our Lord one thousand eight hundred and ——.

"Whereas the above bounden ——, as Clerk (or Bailiff) of one of the Division Courts of the said —— Count —— of —— has been required, according to law, to give security for the due performance of the duties of his Office:

(*In the case of Clerks, the following is the condition.*)

"Now the condition of this obligation is such, that if the said —— shall duly and regularly keep and render all accounts and

returns, which, pursuant to any Act of the Legislature now passed, or hereafter to be passed, ought to be kept and rendered by him, and shall account for, and duly and regularly pay over to the parties entitled thereto, and particularly to the County Attorney for the time being of the said ——— Count ——— if authorized to receive the same, or to such other officer as may by law in that behalf be authorized, all and every such sum and sums of money as shall come into his hands as Clerk of the said Division Court, and which should be so paid over, and shall well, truly and faithfully, in all other respects, fulfil, perform and discharge all and every the duties of his said office, whether such duties be regulated or imposed by any Act now passed or hereafter to be passed by the Legislature of Canada, and whether extended, increased or otherwise altered by any such Act or Acts then this obligation to be null and void, otherwise to remain in full force, virtue and effect."

(In the case of Bailiffs, the following is the condition.)

"Now the condition of this obligation is such, that if the said ——— shall duly and regularly keep and render all accounts, which, pursuant to any Act of the Legislature now passed, or hereafter to be passed, ought to be kept and rendered by him, and shall account for, and duly and regularly pay over to the Clerk for the time being of the Division Court for which he is Bailiff, or to such other Officer or person as shall by law from time to time be authorized to receive the same, all and every such sum and sums of money as he shall collect or receive, or shall come into his hands by virtue of any writ, process or execution, or otherwise, as such Bailiff, other than the lawful fees of him, the said ———, as such Bailiff, and shall well, truly and faithfully, in all other respects, fulfil, perform and discharge, all and every the duties of his said Office, whether such duties be regulated or imposed by any Act now passed or hereafter to be passed by the Legislature of Canada, and whether extended, increased or otherwise altered by any such Act or Acts, then this obligation to be null and void, otherwise to remain in full force, virtue and effect.

Sealed and delivered in the presence of } [*Affix Seals*]

Securing bonds should be executed in the presence of at least one witness, who must subscribe his name and calling or profession.*

With the bond there is an affidavit of justification, which is subjoined.

AFFIDAVIT OF SUFFICIENCY.

"Province of Canada, Count of ——— to wit:

"We, ——— and ———, the Sureties in the annexed Bond named, do severally make oath and say, as follows:

First, I, Deponent ———, for myself, do make oath and say, that I am a freeholder [*or* householder], residing at ———, and that I am worth property to the amount of ———, over and above what will pay my just debts.

Secondly, I, Deponent ———, for myself, do make oath and say, that I am a freeholder [*or* householder], at ———, and that I am worth property to the amount of ———, over and above what will pay my just debts.

Sworn before me, at the ——— of ———, in the said ——— Count ——— of ———, this ——— day of ———, 186—.

———, A Commissioner, B. R., &c.

* See notes to form of Bond issued from the Crown Law Department of Upper Canada.

CORRESPONDENCE.

(To the Editors of the Law Journal)

Gents:—Some four years ago I obtained a judgment against a party in the First Division Court for the County of Lambton, for some $80. Execution was issued on this at various times, but the defendant managed to elude the vigilance of the Bailiff. Finally, last April I caused an execution to be issued, and the Bailiff seized certain goods of the defendant. The Judge of this County, on the application of the defendant, gave an extension of time for two months. The goods were then advertised for sale, and the Judge again extended the time for two months. If you will be so kind as to say whether or not the Judge can exercise such unheard of power under the Division Courts Act, you will confer a favor on the undersigned unfortunate suitor, and many others placed in a like position by the interference of our Judge with executions.

Yours respectfully,

——— GEORGE MORRISON.

[We presume that the Judge must have acted under the 108th section of the Act, which provides that "in case it at any time appears to the satisfaction of the Judge, by affidavit or affirmation, or otherwise, that any defendant is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof ordered to be paid as aforesaid, the Judge may suspend or stay any judgment, order or execution given, made or issued in such action, for such time and on such terms as he thinks fit, and so from time to time until it appears by the like proof that such temporary cause of disability has ceased."

In acting under this section, it seems to us that the plaintiff should have notice of the application to the Judge, and a copy of the affidavit on which it is grounded served upon him, or that he should have been called on by the Judge to show cause, if he had any, against granting a stay on the execution. The power is extensive and unusual and should be sparingly and cautiously used; and in two counties—York and Peel and Simcoe—where we are acquainted with the practice, and where a great number of cases are before the Courts, we do not think there have been ten cases of the kind in as many years.

The latter part of the clause shows that the plaintiff should have notice of the application, for how otherwise can he be in a position to show that the temporary cause of disability has ceased.]—EDS. L. J.

U. C. REPORTS.

COURT OF ERROR AND APPEAL

(Reported by ALEXANDER GRANT, Esq., *Barrister-at-Law)*

THE BANK OF UPPER CANADA v. BROUGH.

(On Appeal from a Decree of the Court of Chancery.)

Mortgagor—Mortgagee—Sale of equity of Redemption

[Before the Hon. Sir J. B. ROBINSON, Bart., C. J.; the Hon. W. H. DRAPER, C. B., C. P.; the Hon. Mr. Justice MCLEAN; the Hon. Vice-Chancellor ESTEN; the Hon. Mr. Justice BURNS; the Hon. Mr. Justice RICHARDS, and the Hon. Mr. Justice HAGARTY.]

Held—Reversing the decree of the Court below, that the provision in the Statute 12 Vict., ch. 75, sec. 1 (Con. Stat. of U. C., ch. 22, sec. 257), which authorizes the sale under execution of an equity of redemption, applies only where the execution is against the mortgagor himself, and on an execution issued against his lands. (ESTEN, V. C., dissenting.)

This was an appeal by the Bank of Upper Canada, the defendants in the Court below, from a decree by which a demurrer put in by them had been over-ruled, and relief given against them.

The bill in the Court below was filed by *Secker Brough* against the Bank of Upper Canada, setting forth, that in the month of May, 1853, plaintiff purchased from Messrs. Strachan and Fitzgerald certain building lots in the City of Toronto, upon which he

had made a cash payment or instalment at the time of the sale, and executed to the vendors a mortgage in fee upon the same lands to secure payment of the balance of purchase money—being the sum of £1,012 10s, on the 26th May, 1861, with interest thereon in the meantime half-yearly. That plaintiff subsequently sold and conveyed these lands subject to the mortgage, to one Robinson; that Robinson afterwards sold and conveyed in like manner to Samuel Zimmerman, who died in the month of March, 1857, seized of the said lots, subject to the said mortgage to Strachan & Fitzgerald, and that the estate and interest of Zimmerman therein became assets in the hands of his personal representatives for the satisfaction of his debts.

The bill further alleged that Zimmerman at the time of his death was largely indebted to the defendants, who subsequently and in the year 1858 instituted proceedings at law against his executors, and recovered judgment for a large amount, and such proceedings were taken upon such judgment that on the 27th of August, 1859, all the estate of Zimmerman at the time of his death was sold by the Sheriff under a writ of *Venditioni exponas*; and that the defendants, acting through their solicitor and agent, Clarke Gamble, became the purchasers thereof, and immediately thereafter the same lands were conveyed by the Sheriff to the defendants, subject only to the said mortgage to Strachan & Fitzgerald.

The bill then submitted that as such purchasers and owners of the premises the defendants were bound to indemnify the plaintiff from the mortgage and all payments and other liabilities in respect thereof, and it was their duty from the time they became such purchasers thereof to pay all interest as it became due under the mortgage, but that they had not done so, and that all interest thereon was in arrear since the 25th November, 1859, including the sum which fell due on that day; and that the mortgagees had called upon plaintiff to pay and insisted upon his paying the said arrears, and had threatened to compel plaintiff to pay the principal money secured upon their mortgage when it became due.

The prayer of the bill was, that the defendants might be ordered to pay the interest accrued due, and the principal money so soon as the same should become payable.

To this bill the defendants put in a demurrer for want of equity.

Upon argument the Court over-ruled the demurrer, and declared the defendants bound to pay off the mortgage and to recoup plaintiff any thing he had paid, and ordered them to pay the same and the costs of the suit.

From this decree the defendants appealed.

J. H. Cameron, Q. C., and *Bunnett* for the appellants.

It is admitted that if an owner sell land which is subject to a mortgage, the vendor, being also the mortgagor, will stand in the relation of surety to the assignee or purchaser; this rule will extend no further, however, and the assignee of the assignee or purchaser could not under such circumstances be looked upon as a principal for whom the mortgagor would be liable as surety. Here the plaintiff is not entitled under the provisions of the statute, or independently thereof to the relief sought by his bill, and given him by the decree appealed from. Independently of the Statute, it is not pretended that any such right accrues to the plaintiff. *Turnbull* v. *Simmons*, 6 Grant's Ch. Rep. 615, shews there is no power in the Court to decree that the assignee of an equity of redemption shall discharge the mortgage; and no case has been found shewing that a mortgagor can compel the assignee of his assignee to indemnify him against the mortgage.

The covenant to pay mortgage money does not run with the land. There is neither contract nor privity of estate between a second assignee of an equity of redemption and the mortgagor, unless the recent statute has worked some change in this respect. But the late act has not effected this change.

By the provisions of the Act the purchaser of an equity of redemption at sheriff's sale is only subjected to the same liabilities that he would have been subject to in case he had purchased from the mortgagor himself. This is the utmost liability that can be established, and more, probably, than a strict construction of the Act would warrant. The statute does afford one remedy, and the mortgagor if he adopt the relief afforded by that Act can have no other, this relief is an action for the mortgage debt and interest against the purchaser, in case the mortgagor has been compelled to pay the same to the mortgagee.

The facts of this case shew the propriety of the Court holding that the remedy of the mortgagor is confined to what the statute expressly gives. Here the bill does not negative the existence of a covenant from *Robinson* to *Zimmerman* to pay off the mortgage and indemnify *Zimmerman*. It may be said that this mode of proceeding is adopted to save circuity of action, but if so, then it should be shewn that each succeeding party was liable to his immediate assignee. Or let us suppose that a set off might exist by subsequent parties as to their immediate assignee, it may be that the Bank would have a complete answer to any claim which Zimmerman's estate could make, although no such answer might be available to the claim of any intermediate party, *Burrett* v. *Lynch*, 5 B. & C. 589; *Underhill* v. *Ellicombe*, 1 McL. and Y., 450; *Introbus* v. *Davidson*, 3 Mer. 569; *Yonge* v. *Reynell*, 9 Hare 809; *Jones* v. *Kearney*, 1 Dr. and War. 135; *Cox* v. *Bishop*, 3 Jur. N. S. 499, were also referred to by Counsel.

Brough, the respondent, in person,—The plaintiff always had this remedy independently of the statute. Then under the statute, section 3, of the original Act, merely expresses what the law was before, at least so far as the rules of a Court of Equity were concerned. It simply makes the purchaser of the equity of redemption at a sheriff's sale a debtor at law, and gives a right of action against him. All the mortgagor's equitable rights remain untouched, but in addition a legal remedy is afforded to him.

Tweedell v. *Tweedell*, 2 B. C. C. 101; *Copey* v. *Cope*, 2 Salk. 449; *Close* v. *Wilberforce*, 1 Beav. 112; *Lucas* v. *Comerford*, 3 Br. C. C. 166; *Moore* v. *Greg*, 2 Phil. 717; *Moxhay* v. *Inderwick*, 1 Deg. and S. 708; *Walker* v. *Bartlett*, 17 C. B. 446; *Humble* v. *Langton*, 7 M. and W. 517; *Fagg* v. *Debie*, 3 Y. and C., 96; *Tulk* v. *Moxhay*, 2 Phill. 774.

Cameron, Q. C., in reply.—If principal money not due and assignee transfers equity of redemption to another person, the liability of the assignee is at an end, and yet this decree would make a prospective charge binding upon the Bank, at a time when they may have got rid of all liability.

DRAPER, C. J. C. P.—[After stating the facts of the case]—The statute 12 Vic. cap. 73, first enabled creditors to sell the interest and equity of redemption of mortgagors of real estate in Upper Canada on writs of *fieri facias* against lands.

The 1st section authorizes the sheriff upon any *fieri facias* lawfully issued against the lands of any person who may be a mortgagor, to seize or take in execution all and every (in like manner as other real estate might be seized, &c.,) the legal and equitable estate, right, title, interest and property and the equity of redemption of such mortgagor in any lands.

The 2nd section declares the effect of the seizure and sale to be, to transfer to, and vest in, the purchaser, his heirs and assigns, all the legal and equitable estate, &c., of such mortgagor, of the lands and tenements so seized, &c., at the time the writ was placed in the sheriff's hands, and at the time of the sale to vest in the purchaser, his heirs and assigns, the same advantages, rights, privileges and powers as such mortgagor would have had if the sale had not taken place; and provision is made that the purchaser, his heirs or assigns, may pay off any incumbrance, and shall thereupon acquire the same right, &c., such mortgagor would have possessed in case he had made such payment, and on payment of the mortgage money to the mortgagee by the purchaser he shall be entitled to a certificate of payment and discharge which shall be of the like effect and shall be acted on as if it had been given to the mortgagor his heirs, executors, administrators or assigns.

The 3rd section authorizes the mortgagee, his heirs or assigns, to purchase at such sale, &c., to acquire the same right and interest, &c., as any other purchaser might do, provided that if the mortgagee becomes the purchaser he shall give the mortgagor a release of the mortgage debt, and if any other person becomes purchaser, and the mortgagee enforces payment against the mortgagor, then the purchaser shall be compelled to repay the debt and interest to the mortgagor, and in default of payment within one calendar month after demand, the mortgagor may sue for the same in an action for money had and received, and until repayment the debt shall be a charge on the lands so mortgaged and sold. These clauses are consolidated in cap. 22 Con. Stat. U. C., ss. 257-8-9. It is to be observed that the words heirs, executors,

administrators or assigns are not either of them used in connection with the term mortgagor except at the end of the second section. It may be observed that sec. 4 of 12 Vic. cap. 73 is not enacted in the consolidation of this act, but the provisions of the Consolidated Stat cap. 22 are left to the General Interpretation Act cap. 2 of the Con. Stats of Upper Canada. The 12th section of this Act, the only one that can have any bearing, is not applicable, for the three sections above referred to (257, 258 and 259 of cap. 22) do not contain the word "person" If, however, I was simply construing the 12 Vic, cap. 73, I should arrive at the same conclusion, for I do not think it would be "*consistent or reconcileable* with the intent and meaning" of that act to hold that when the "*mortgagor* is described in *its* provisions, *it*" (that is the description of the person) should be held to apply to the mortgagor, his heirs, executors, administrators and assigns.

Looking at the title and the preamble, and the precise language of the original act, and using these as aids for construing the Consolidated Act, as we think we are not in any way prevented from doing by the Interpretation Act, (ch 2nd of the Con. Stats,) we are of opinion that the enactment in question only authorizes the sale of the legal and equitable estate, &c., and the equity of redemption of the mortgagor, on a judgment recovered against *him* and on an execution against *his* lands and tenements. Throughout the act, when the interest or estate of the mortgagor is spoken of, and when any reference is made to the effect of a sale, and to the consequences which under particular circumstances may follow, the mortgagor alone is referred to, and the possibility that his interest and equity of redemption may have been conveyed by him to a third party, is never apparently contemplated; tending so far at least to show that the object of the act was not to subject equities of redemption to sale under a common law execution, excepting in the hands of the mortgagor upon whose mortgage they arose, and upon a judgment against him. The act does not even provide that the equity of redemption of a deceased mortgagor may be sold for his debts, upon a judgment against either his executors or administrators, or even against his heirs in an action on a specialty debt of his, conceding that such an action is maintainable. It does not seem to contemplate the very possible case that the assignee by purchase from the original mortgagor of the equity of redemption might afterwards mortgage that equity for his own debt, and might have a judgment recovered against him on which an execution against his lands and tenements might be issued; he would have an equitable right to redeem arising out of his own mortgage, and the rights of the first mortgagor would also be vested in him; and yet to hold that the last created equity of redemption could be sold on a *fieri facias*, would be more like a supplementary enactment than a construction of the act in its present shape. We think it safer and more consistent with the intention of the legislature, to limit the operation of the statute to the case which its language plainly defines, namely, the legal and equitable estate, right, title, interest and property and equity of redemption of a mortgagor, on a writ of execution issued against his lands and tenements. The present bill is founded on an equity assumed to arise from the fact that the equity of redemption originally vested in the plaintiff as mortgagor of certain lands (of which he had been previously seized in fee simple) was sold and assigned by him; and that by virtue of a sale by the sheriff, on an execution against a subsequent assignee, the equity of redemption became vested in the defendants. We do not adopt this latter view of the effect of the sheriff's sale and conveyance to the Bank of Upper Canada. Without the aid of some statutory enactment it is clear that this equity could not be the subject of a common law execution, and we are of opinion the statute does not extend to a case like the present, where the judgment and execution on which the sale took place are not against the original mortgagor.

This is the judgment of all the Judges who heard the case argued, except my brother ESTEN, who I believe adheres to the opinion expressed in the Court below *The Decree, therefore, must be reversed and the Plaintiff's bill be dismissed.*

ESTEN, V. C.—The appellants object to this decree on the grounds:—

1st. That the only remedy available to the mortgagor when the equity of redemption has been purchased at sheriff's sale is that provided by the statute, namely, to pay the debt and demand its re-payment from the purchaser, and if not repaid to bring an action for its recovery and to have a lien for it on the estate in the meantime.

2nd. That the relation of principal and surety has *not* been constituted between these parties so as to entitle the supposed surety to the relief which the decree affords him against the supposed principal.

With reference to the first ground it is urged, that when a statute creates a right and prescribes a remedy, that remedy and that alone can be pursued, and some cases were cited in support of that proposition the correctness of which as a general rule may be conceded. I think, however, it is a rule that prevails only at law. The proposition, I apprehend, is universally true, that when the relation of principal and surety is created, although it may be by an Act of Parliament creating a right and prescribing a remedy, the Court of Chancery will administer the equity of compelling the principal *a priori* on a bill *quia timet* to discharge the debt and save the surety from a suit. Thus on a bond made by principal and surety, the legal remedy of the creditor is to sue both or one, and if he sue the surety he in turn must sue the principal. Equity finds this state of things, but in order to prevent circuity or multiplicity of actions, and in order to guard the surety against a danger of indefinite duration, gives direct relief against the principal by compelling him to pay the debt to the creditor, and I apprehend if a Court of Equity found the same state of things, although arising under a statute, creating a new right and prescribing a remedy, it would administer the same relief. Thus, if the statute imposing the composition in lieu of statute duty, had provided that the composition should be paid by one of two parties, but if paid by one he should be indemnified by the other; I have no doubt a court of equity would compel the latter at the suit of the former to pay the composition, and save him harmless; and although the Act giving a remedy by distress and therefore prohibiting an action might be thought also to prohibit a similar equity, yet I should think otherwise, and that even in this case the court would entertain the suit of the party entitled to indemnity to compel the other party to pay the composition and save his goods from being distrained; and of course the objection would not apply to a case where it was provided that an action might be maintained as in the present instance. It was then urged that if the mortgagor paid the debt and brought an action for its recovery, defences might exist to such an action by way of set off and otherwise. This objection, I think, is much more untenable than the former. There is no possible defence that could be made at law to such an action that would not be equally available in Equity to a Bill *quia timet*. Nay, a Court of Equity would probably allow many defences which a Court of Law could not recognize. Equity recognizes and gives effect to every legal set off, and to many that are not legal but merely equitable. If the surety should owe a debt to the principal, he could not compel him to pay a debt for which he was surety and exonerate him without first paying his own debt. I am satisfied that there is no possible defence which could be raised to an action by the mortgagor which would not be equally available as a defence to a bill *quia timet* for payment of the mortgage and the exoneration of the mortgagor, and probably many other defences would be open to him upon such a bill in equity that a court of law could not allow. In fact the purchaser would have a right to insist that he could not on such a bill stand in a worse position for any purpose than if the mortgagor had paid the debt and then sued him for its re-payment. I therefore do not feel much pressed by this argument. The suit probably could not be instituted until a demand had been made upon the purchaser, and thirty days had elapsed without its having been complied with. I think much more weight is due to the point, which was not however very distinctly raised in the argument, that the relation of principal and surety was not constituted between these parties. For this position the case of *Antrobus* v. *Duncon*, 3 Mer. 569, was cited. In that case the suit was not by the surety but against him, that is, so far as his immediate contract was concerned, and as regards the general transaction, it was a mere dealing by one party with another through the medium of an agent, for whose acts he was of course responsible, and who in his turn was bound to indemnify the

principal. But of course the equity does not apply to such a case, and if it did not apply to the principals, who were the army agents, it could not of course apply to the defendant who was the personal representative of their surety. The important points which appear to me to arise in this case are, 1st. Whether the Act of 12th Victoria, cap. 73, applies to assignees of the mortgagor; and, 2nd. If it does, whether the relation of principal and surety is constituted between the mortgagor and the purchaser at sheriff's sale. The learned counsel for the appellants did not argue that the Act applied only to equities of redemption in the hands of the mortgagor. Such an argument would have been fatal to his clients' title, for in such a case the sale under which they claim was void. The question does not appear to me to be free from difficulty. Thus, if the mortgagee should himself purchase he is directed to give a release of the debt which could not be done to an assignee of the equity of redemption. Perhaps a more important difficulty is, that by the terms of the assignment the mortgagor may be bound to pay the mortgage debt. Such transactions are not unfrequent. In such a case if he did pay the debt it would not be just that it should be repaid. Under such circumstances, however, it is not an equity of redemption which is transferred but the entire estate, the full value of which the assignee has no doubt paid to the mortgagor, who in his turn has undertaken to discharge the mortgage. I think, however, these difficulties may be overcome and are outweighed by the strong probability which exists that the Legislature could not have intended to confine the Act to cases in which the equity of redemption remained in the hands of the mortgagor, which would give the Act a very limited operation, but must have meant it to extend to cases in which it had been alienated both to immediate and remote assignees. No injustice, as appears to me, could result from this construction. If the mortgagor have alienated the equity of redemption, and it were the intention of the parties that the purchaser should discharge the mortgage then, if the equity of redemption be purchased at sheriff's sale, and the mortgagor afterwards be compelled to pay the debt, it is perfectly just that the purchaser should re-pay it. If, on the other hand, the mortgagor have undertaken to pay it, and have received the full value of the estate, or if any intermediate assignor have pursued this course, in which cases respectively the mortgagor or assignor, will have covenanted to pay the mortgage debt; still it may be considered that the equity of redemption only passed, and may be offered for sale by the sheriff, and that the covenant for payment of the mortgage debt was collateral and to be enforced by the party entitled to the benefit of it against the party liable upon it, the purchaser at sheriff's sale meanwhile paying the mortgage debt, or repaying it to the mortgagor, if he shall have been compelled to pay it

Upon the other question, whether the relation of principal and surety is constituted between the mortgagor and purchaser at sheriff's sale, I entertain much doubt. In deciding this case I assumed as a proposition universally true, that wherever, if one party paid a debt, he was entitled to be indemnified by another party, the relation of principal and surety was constituted between the two parties. I doubt the correctness of this proposition stated in this broad way. No doubt the party entitled to indemnity may properly be called a surety, and the party obliged to indemnify may be called the principal as between themselves; but I question whether it is not an essential element in a case for such equitable relief as was administered in this instance, that they should both be liable to the creditor. When the supposed principal is not liable to the creditor, it may be very true that as between him and the supposed surety he is a principal, but he cannot be the principal debtor, *quoad*, the creditor, because as to him he is no debtor at all. The practice is in such cases, for the surety to bring the principal and the creditor before the court and to compel the principal to pay the debt, and the creditor to receive it, and to deliver up the securities; but in a case where the supposed principal was not liable to the creditor, it appears to me that the creditor might demur and say he had nothing to do with him, and was not bound to receive the money from him. The question is, whether the present is not a case of that description. The act creates no privity between the purchaser and the mortgagee. The mortgagee cannot sue the purchaser. He can foreclose his equity of redemption, but he cannot sue him for his debt. The purchaser is not liable to the mortgagee, and the liability of the estate in his hands would appear insufficient to constitute the relation which is necessary to found the equitable relief administered in such cases. It would seem that if relief is to be given to the mortgagor in such cases it must be on another principle, namely: that as the act has provided that if the mortgagor shall be compelled to pay the debt the purchaser must repay it and indemnify him, he is not obliged to wait until the mortgagee may choose to sue him, when perhaps the purchaser may have become insolvent; but is entitled on the principle of *quia timet* to require an immediate settlement in order to protect him from the possibility of loss. And I should not think that the purchaser under such circumstances could object that thereby he would be compelled to keep the estate and pay the debt against his will; whereas he might otherwise be enabled to surrender the estate and avoid payment of the debt, he having purchased the estate and come under an obligation to indemnify the mortgagor so as to make him perfectly safe. These observations would go to prove that in order to confer a title to the relief which has been administered in this case, it is not necessary to show a privity between the party bound to indemnify and the creditor, but that it is sufficient to show the obligation to indemnify, and the possibility that through the delay of the creditor that obligation may become of no avail. It is obvious that the mortgagee may delay suit until the interest has accumulated, so as to render the estate a defective security, and then he may sue the mortgagor on his covenant, who, on attempting to obtain indemnity from the purchaser, may find that he is insolvent. This would be contrary to the intention of the Legislature, which meant that the mortgagor should be perfectly safe after the equity of redemption had been purchased at sheriff's sale. Upon the whole I cannot see that the decree is wrong on this ground, and upon the other grounds, I think it is right, and ought to be affirmed, and the appeal dismissed with costs.

Re Freeman, Craigie and Proudfoot.

(On an appeal from an order of the Court of Chancery.)

Practice—Appealable order—Costs.

The right of appeal from Chancery is confined to orders or decrees made in a cause pending between parties, where therefore an appeal was made to this court from an order directing the taxation of a Solicitor's bill against his Client in a particular mode, the Court dismissed the appeal with costs

The respondent, although he may, is not bound in such a case to move at an earlier stage to quash the proceedings.

This was an appeal from an order referring back the bill of Messrs. *Freeman, Craigie* and *Proudfoot* for taxation by the Master, and directing the mode in which the taxation should be had. The circumstances are stated in the report of the case, Chancery Chambers Reports, page 102.

Blake for the respondents (the Solicitors), on the matter being called on objected, that this was not an order from which an appeal would lie, and referred to McQueen, 101-2

Roaf, contra, submitted that this was not a proper mode of taking advantage of such an objection; the proper course was, by application to quash the appeal without suffering the appellant to incur the expense of preparing for the argument. If the court, therefore, should be of opinion that the appeal would not lie, no costs would be given on the dismissal. But, after the Court took time to look into the practice the following judgment was delivered by

Sir J. B Robinson, Bart, C. J.—This is an appeal from an order made by His Honor, Vice-Chancellor Esten, on the 22nd of February, 1861, upon a petition of Messrs. Freeman, Craigie & Proudfoot, Solicitors, to the Court, for a direction to the Master to review his report and certificate made upon a reference to him for taxation of certain bills of costs delivered by the Solicitors, to Daniel Totten their client.

The Vice-chancellor, by the order complained of, did refer the taxation back to the Master with certain directions, bearing principally upon the point whether the costs of taxation, should, under the circumstances, be borne by Totten or by the Solicitors. The costs of taxation had been allowed by the Master at £16 4s. 3d.

It is objected on the part of the Solicitors that this is not an appealable order. The grounds on which Totten objects to it apply to the propriety of the directions given to the Master respecting the costs of taxation, and the costs of and incidental to the reference.

We think the proceedings in appeal must be quashed under the 10th section of the Appeal Act, on the ground that this is not an appealable matter, there being no cause pending between the parties, in which the order complained of was made.

It is true that the ninth section of the Act gives an appeal "from all judgments, orders, and decrees of the Court of Chancery," but that has been always taken to mean judgments, orders and decrees—whether interlocutory or final, in a cause. The fifty-fourth section of the Act shews that to be the intention; and the general principles which govern appeals in equity preclude an appeal from such an order as this *

Then besides that, this is an order made upon petition and not in any suit upon a bill filed: the subject matter of the petition and order is such that an appeal does not properly lie against the decision of the Court upon it which merely affects costs proper to be allowed by a taxing officer.

No case has been cited in support of this appeal, and both principle and policy are against it.

Per Cur.—Appeal dismissed with costs.

CARPENTER *v.* THE COMMERCIAL BANK OF CANADA.

(On Appeal from a Decree of the Court of Chancery.)

Collateral security—Defence at law—Plea of payment.

A defendant at Law, pleading a plea of payment, and either failing or neglecting to establish the plea, cannot afterwards set up the same facts as a defence to a bill in Equity to enforce payment of the judgment at Law.

An action at law having been brought upon a promissory note, and the defendant having pleaded that it had been given as collateral security for another debt, which had been paid, but adduced no evidence to establish this fact, was held precluded in a suit afterwards instituted in the Court of Chancery to enforce the charge of the judgment against lands, from showing any payments prior to the time of plea pleaded. [ESTEN, V. C., *dissentiente.*]

The bill in the court below was filed by the Commercial Bank of Canada against Joel Carpenter and Brian Carpenter, and set forth, that on the 31st May, 1859, the plaintiffs recovered judgment in the Court of Queen's Bench against the defendants for £1,559 15s. 10d. damages and costs, which was duly registered in the county of Wentworth, in which the defendants were possessed of certain lands (setting them forth); and that £100 14s. 1d. had been paid on account of such judgment; and prayed payment of the balance, or in default a sale.

The defendant Brian Carpenter answered, setting up that the judgment of plaintiffs was recovered upon a promissory note made by the other defendant, and endorsed by one McKinstry and defendant Brian Carpenter, under the circumstances following: That Joel Carpenter, on the 21st March, 1857, was and for some time previously, had been carrying on business as a merchant in Hamilton, and that the Bank held notes endorsed by him, and which they had discounted for him to a large amount, which notes so discounted were notes of his customers; that a large portion thereof had been settled by notes endorsed by other persons; and that the note so endorsed by defendant was delivered to and accepted by the Bank as collateral security for the balance of such customers' paper, being £3,000, it being alleged by the Bank that one-half of such balance was doubtful, but that the whole thereof had since been paid: that the loss, if any, had arisen in consequence of the Bank neglecting to collect and get in the money due upon the other notes delivered to the Bank in settlement of the greater portion of such indebtedness.

The cause had been heard upon a motion for decree. The affidavit of the managing agent of the Bank was read on behalf of the motion, setting forth that the defendant Brian Carpenter was not personally aware of the circumstances under which the note was given to and accepted by him; that no such arrangement as alleged in the answer was made; that the only payment on account thereof was the sum stated in the bill; and that if any such defence had existed to the claim of the Bank, the defendants had the opportunity of urging, and did by plea and at the trial of the action upon the note attempt to prove and urge, but without effect, all the supposed defences set up by the answer.

The defendants both made affidavits in opposition to the motion; and an affidavit of McKinstry was also read, in which he swore tha the endorsed the note for £1,500 in consequence of the dissatisfaction expressed by the Bank at the supposed lapse of a guarantee given for the amount of Carpenter's discounts whilst McKinstry had been manager of the Bank; and that there never was any intention that the said note for £1500 should be held for any other purpose than the protection of the balance of the customers' paper.

Upon the hearing, the court below directed that "it should be referred to the master of this court at Hamilton, to enquire and report whether the note on which the plaintiffs' judgment in the pleadings mentioned was recovered, was held by the plaintiffs as a collateral security merely, or how otherwise; and if as a collateral security merely, then, for what. And if the said master shall find that such note was held by the plaintiffs as collateral security for the payment of any other promissory notes, bills of exchange, or securities for the payment of money, then said master is further to enquire and report whether any, and if so, what payments beyond the sum of one hundred pounds and fourteen shillings, credited in the plaintiffs' bill, have been made upon the notes upon which such judgment was recovered, or upon such judgment, or upon the promissory notes, bills of exchange, or other securities for the payment of money as collateral security for which such first-mentioned notes were deposited, since the pleading by the said defendant Bryan Carpenter of his plea of payment in the action at common law in which such judgment was recovered; and in the event of said master finding that enough has not been so paid, beyond the amount credited in the plaintiffs' bill as aforesaid, to satisfy the said judgment of the plaintiffs, the said master is to further enquire and report whether the defendants, or either of them, have any other, and if so, what other, lands, tenements, or equitable or other valuable rights or interests in lands or tenements in the county of Wentworth, besides those particularly described in the plaintiffs' bill, and if so, whether any person or persons other than the plaintiffs has or have any lien, charge or incumbrance thereupon; and in case the said master shall find any such, then he is to cause them to be served with process under the general orders of this court in that behalf, and is to proceed to take an account of what is due to the plaintiffs and such other incumbrancer or incumbrancers for principal money and interest, and to tax to them their costs of this suit, and to settle their priorities. And this court doth reserve the consideration of further directions, and of the costs of this suit, and of all subsequent costs, until after the said master shall have made his report."

From this decree the defendant Brian Carpenter appealed, assigning as reasons therefor, first, that in and by the said decree, it should have been referred to the master of this honorable court at Hamilton, in case he found that the note on which the plaintiffs' judgment was recovered, as mentioned in the pleadings, was held by the plaintiffs as a collateral security for the payment of any other promissory notes, bills of exchange, or securities for the payment of money, to enquire and report whether any, and if so, what payments beyond the sum of £100 14s., credited in the plaintiffs' bill of complaint, had been made upon the note upon which such judgment was recovered, or upon such judgment, or upon the promissory notes, bills of exchange, or other securities for the payment of money as collateral security, for which such first-mentioned note was deposited by the said defendant Brian Carpenter with the plaintiffs, since the same was so deposited and held by the said plaintiffs as such collateral security as aforesaid; secondly, that the defendant Brian Carpenter being surety for the other defendant Joel Carpenter to the said plaintiffs, is, but ought not to be, restricted by the said decree in this cause from showing all payments made by him or any other person on the note first mentioned, or on account of the securities for which such first-mentioned note was security, to the said plaintiffs since he became such surety as aforesaid, whether the same were made before or after the plea by the defendant Brian Carpenter in the action at common law; thirdly, that such last-mentioned plea, although assumed and declared by the said decree to be a plea of payment,

* McQueen on Appeals, ch. 1.

is not such a plea in the form in which it is pleaded by the said defendant Brian Carpenter, nor does the said plea afford any evidence that the said defendant did or might show or attempt to show thereunder *any payment* or payments to the extent or effect of preventing him from showing in this cause all the payments made at any time by him or any other person since he became such surety as aforesaid, in reduction of his liability as aforesaid.

Fitzgerald for the appellant.

R. Martin for the respondents.

Sir J. B. Robinson, Bart., C J.—It is somewhat difficult to deal with this case so as to attain the ends of justice without seeming to violate the principle—which it is important to maintain—of the conclusiveness of the judgment obtained at law in the action between the parties on this same note for £1500.

The truth of the case appears to be, that in the action upon the note there was clear proof of the allegation in the plea, that it was made and delivered by Brian Carpenter as security for his son Joel Carpenter, against any deficiency not exceeding that amount that might accrue in the collecting the notes that remained deposited with the plaintiffs after the withdrawal of seven thousand pounds' worth of the notes, for which those of McKinstry and others had been substituted.

That part of the plea was not only not proved, but it was not even attempted to be proved. In order, however, to make the plea a defence against the whole or any part of the demand, it was necessary to go further, and to prove what the plea further alleged, that payments had been made on the notes left with the plaintiffs, which the note of the defendants for £1500 was to secure, and to such amount as either left nothing due to the plaintiffs upon them, or not so much as entitled the plaintiffs to a verdict for the full amount of the defendants' note for £1500. But the fact is, that no attempt whatever was made upon the trial to prove any payments on account of the £3000, though clearly the plea admitted such evidence, and therefore the verdict at the trial went properly for the plaintiff for the full amount.

In framing the postea, however, this error has been committed—the jury are made to negative the first statement in the plea, namely, that the £1500 note was made and delivered as security for the payment of the notes amounting to £3000, which were still in the plaintiffs' hands, to be collected and applied in payment of the debt remaining due by Joel Carpenter. Now, the plea could be no defence, unless that allegation is true; and if that had been in fact found against the defendant, it would have been wholly immaterial whether the customers' notes to the amount of £3000 had been paid or not; and so the verdict for the plaintiffs upon the plea would be correct, and it would be of no consequence that the jury had not specially found one way or the other as to the fact of payment. The trial of the action on the $1500 note took place before the learned Chief Justice of the Common Pleas; and upon examination of what passed at the trial, it is quite evident that the postea had been incorrectly framed, as I have stated; for it was clearly proved upon the trial, and not contradicted by any testimony, that the £1500 note was made and delivered as security for the payment of the £3000 of notes left with the plaintiffs by Joel Carpenter; but as that fact alone would signify nothing, without proof of payment of the £3000, or of so much of it at least as would go to show that the plaintiffs were not entitled to recover for the whole amount of the note, the verdict, in the absence of any proof whatever of payment having been made on account of the £3000, was properly entered for the plaintiffs, though not on the ground on which the postea places it.

If there were payments, in fact, made on the other notes, which would have shown this note in effect to be no longer recoverable either in whole or in part, the defendant was bound to show it on the trial of the common law action. The plea allowed and called for such evidence, if it could have been given; and we are bound to treat the verdict and judgment for the plaintiff as conclusive. The plaintiffs in their bill set forth the judgment; the defendant in his answer admits it; and the judgment was also proved in the court below.

I do not think, therefore, that it should have been referred to the master to enquire whether the note was given to secure the payment of the £3000 still due by Joel Carpenter on the notes deposited, because that question is disposed of between these parties by the judgment entered of record, which, while it is unreversed, is conclusive between them, no fraud in obtaining that judgment having been proved or alleged. The plaintiffs, however, have acquiesced in the decree, and the defendant Brian Carpenter only has appealed, and on the ground that payments made before the plea pleaded, as well as of what there should be credited in the account to be taken by the master. No doubt if at any time before or after the plea there have been collections made by the plaintiffs on account of the £3000, which would not leave a deficiency as large as the amount of the £1500 note to be made up by Brian Carpenter, the plaintiffs should be willing in the accounts to give to the defendant the full benefit of such payments. I have no idea, from the evidence given in the case, that payments to that extent were made on account of the £3000 before the plea pleaded; and I think it scarcely a matter of doubt, therefore, that there is nothing substantial in the reasons of appeal.

I think, without the assent of the plaintiffs, we ought not to admit of a reference to the master to enquire whether the £1500 note was given to secure the payment of so much of the £3000 due by Joel Carpenter or not; and if the judgment as it stands should be taken to be conclusive upon that point against the defendant, then there would be nothing to be enquired of but payments made since the trial *on account of the verdict; for the judgment in the* common law action, so long as it stands, establishes the fact that there is no connection between the £1500 note and the £3000 due by Joel Carpenter.

I think we cannot properly do otherwise than reverse that part of the decree which refers it to the master to enquire and report whether the defendant's note, *on which judgment has been recovered*, was held by the plaintiffs as collateral security, and direct that it be referred to the master to enquire whether any and what payments have been made since the trial of the common law action, *on account of the verdict given in that action*, or the sum for which judgment has been obtained; and I will suggest that on account of the manifest error in entering up the judgment, the plaintiffs consent that payments made on account of the £3000 *since the trial* should be treated by the master as payments made on account of the claim under the judgment on the £1500 note, as if they had been made by Brian Carpenter himself.

In the accounts, as I stated before, the plaintiffs should be willing to admit an account to be taken of all payments *at any time* made on account of the £3000, in order that it may be ascertained whether in truth there remains anything, and how much, due of the £3000, for £1500 of which the defendant made himself responsible; but we could not properly insist upon that, because the defendant should have given proof upon the trial of any payments that had then been made.

Esten, V. C.—It appears to me that the judgment is inconsistent with the verdict of the jury. The latter negatives the fact of the note having been given upon any such understanding as that alleged in the plea, while the decree supposes that such fact may have occurred, and directs enquiries in order to ascertain whether it had occurred or not. I presume also that if any payments had been made on the note before the entry of the judgment, credit would have been given for them, and the judgment entered for the true amount, so that it was unnecessary and improper to direct enquiry as to any payments between the plea and the judgment. But the question is, whether, if this note was really given as collateral security for other notes, it was not competent to Carpenter to let judgment pass against him for the full amount, and to institute a suit in the Court of Chancery for an account, as that court has jurisdiction over all matters of security, and the account could more easily and effectually be there taken; or in case the plaintiffs did not proceed to execution at law on the judgment, but instituted a suit in the Court of Chancery for enforcing their equitable charge, whether Carpenter could not have insisted that the note was given as collateral security, and prayed an account accordingly. I think such a course would have been proper on the part of Carpenter. If so, it must be immaterial that he pleaded a plea which he was not obliged to plead, and offered no evidence in support of it. Such appears to have been the fact, *from his own* affidavit, uncontradicted by that of Mr. Park. If, indeed, he had offered evidence, and the jury had rendered a verdict against him upon the evidence, the result might have been different. The

question, then, having been properly raised at the hearing of the motion, evidence was received on both sides. It seems at present in favor of the defendant. The fact is distinctly stated by McKinstry and Joel Carpenter; and although it is denied by Mr. Park, he does not state upon what consideration the note was given. The court, however, wishing to afford an opportunity to adduce further evidence, directed enquiry on this head; but it seems to me that the enquiry was improperly limited to the time subsequent to the plea. If I am right in my supposition that Carpenter might let judgment pass against him, and seek an account in the Court of Chancery either by a bill of his own or by way of defence to the plaintiffs' bill, then the account should extend to the time of the delivery of the note, and I think the decree should be varied to this extent. If, indeed, Carpenter should be held bound to make his defence at law, and, having pleaded such a plea, to substantiate it by evidence, then I presume the result is conclusive against him, as we must suppose either that McKinstry, Manson, Joel Carpenter and Park were examined as witnesses, and the jury believed Park in preference to the others, and so rendered a verdict in favor of the plaintiffs, or that no witnesses were examined at all, in which case the defendant would be equally bound, having had an opportunity to make his defence, and not having availed himself of it. But in this case the decree would be erroneous in directing an enquiry at variance with the verdict of the jury. However, as on taking the account it would have been absolutely necessary to show and recognise the purpose for which the note was given, the real transaction would inevitably have appeared. I think the decree should be varied to the extent I have mentioned, without costs.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at Law, Reporter to the Court.*

IN THE MATTER OF THE ARBITRATION BETWEEN THE CORPORATION OF THE TOWN OF BARRIE AND THE NORTHERN RAILWAY COMPANY OF CANADA.

Award—Uncertainty—Motion to be set aside.

A dispute arose between the Northern railway Company and the Corporation of the town of Barrie as to the construction of a branch line into the town, and it was agreed by both parties that a bill relating thereto, which was before the house of parliament then in session, should be withdrawn, and all differences connected with the claim of the town against the company be referred to the arbitration of one H. The arbitrator awarded that there was in 1853 a valid agreement by the company with the town to construct this line, provided that suitable land should be procured by the town: that suitable land was so procured, but that the line had not been constructed, that the claim of the town to have such agreement performed still subsisted, and if not performed their right to compensation in lieu thereof ought to be awarded." He then awarded as compensation for the non-performance of the said agreement, and in full satisfaction of the said claim, that the company should pay to the corporation at a day and place named, £5000, and that they should, when requested by the town, execute to them a conveyance in fee of all the lands mentioned in a certain indenture made by one B to the company, and should further, when so requested execute a general release of all claims in respect of the land and right of way conveyed to them by the several parties over whose lands the said branch line was to pass. On motion to set aside this award for defects apparent on the face,

Held, that it was not *defective for uncertainty* as to whether the agreement had been carried out, and whether the company had an option to pay the £5000 or construct the branch line, but sufficiently shewed that it had not been performed and that no such option was intended: that the direction as to the conveyance and general release were authorised and the latter not objectional for omitting to state to whom it was to be made, and that as to the amount awarded, if, as contended, the corporation could claim no damages beyond what they had expended in procuring the land, &c., it should be assumed that no more was given.

Held, also, that the inability of the company under their charter to expend their funds in paying the award, would be no ground for setting it aside.

(E. T., 25 Vic., 1862.)

Galt, Q.C., obtained a rule on defendants to shew cause why the award in this matter should not be set aside on the following grounds:

1. *For uncertainty*, in this, that the language of the award leaves it doubtful whether the arbitrator intended that the company should have the option of carrying out the agreement entered into between the parties for constructing the branch line, (to lead from the station into Barrie), or in default thereof to pay the £5,000 awarded.

2. That it is uncertain also in this, that the arbitrator does not find by this award whether the agreement has or has not been carried out, and leaves the right of the town to claim the money to depend on the establishment of that fact.

3. On the ground that the arbitrator has exceeded his authority, *in ordering a conveyance* to be made by the company to the corporation, of certain lands formerly conveyed by one Boon to the company.

4. And has exceeded his authority in directing the company to execute a general release of all claims in respect of the land and right of way conveyed to them, or agreed to be conveyed to them by the several parties over whose land the branch line from the main track to Barrie was to pass, and without directing to whom the release is to be made.

5. On the ground that the arbitrator has not stated what sum has been expended by the town in procuring land and water frontage for a turning with right of way thereto, but has awarded generally that £5,000 be paid as compensation for non-performance of an agreement made to construct a branch line to Barrie, which it is submitted cannot be done, for that a municipal corporation cannot claim damages for the non-fulfilment of such an agreement without shewing damage to the corporation, and that such damage must be taken in this award at the sum actually expended by them, which sum is not found by the arbitrator.

6. That the amount awarded is excessive.

The submission was in the first place provided for by a certain written agreement made between the parties in Quebec on the 16th of May, 1861, while a bill was before the legislature, then in session, respecting the construction of the branch line into the town of Barrie, which bill it was agreed by both parties should be withdrawn on the signing of the agreement. And they further agreed that the matters in dispute arising out of a claim of the corporation of Barrie against the company, in connection with the construction of a branch line into the town of Barrie, should be referred to arbitration, and that in such reference no appeal should be made to the act relating to the Northern Railway of Canada, passed in 1859, or to a certain order of the Governor-General in Council, of the 12th of May, 1859, or to the act in relation to the Northern Railway passed in 1860, so far as to prevent or relieve the said company constituted by those acts from being bound by any obligation contracted by the Northern Railway Company of Canada with the Corporation of Barrie before the passing of the said acts, but that the arbitration should proceed to be heard, and be determined, and an award made, as though the said acts had not been passed.

This preliminary agreement then provided that the Hon. S. B. Harrison, judge of the county court of the united counties or York and Peel, should be the arbitrator, and that his award should be final: that proper bonds should be entered into by the parties; and that the submission should be made a rule of court.

In pursuance of this agreement bonds were entered by the respective parties, under their proper corporate seals, in which it was recited that disputes and differences had arisen between the parties, and were then pending, as stated in the agreement of the 16th of May, 1861, referred to, and that the said S. B. Harrison had been named the arbitrater by both parties for determining such differences; and the condition of each bond was, that the obligors respectively should well and truly submit to, abide by, and perform the award of the said arbitrator touching and concerning the said matters in dispute between the railway company and the said corporation, and so referred as aforesaid.

By his award made on the 31st of January, 1862, the arbitrator awarded:

1st. That there was in 1853 a valid and binding agreement by the Northern Railway Company with the Corporation of the town of Barrie to construct a branch line of railway from the main track in Innisfil into the town of Barrie, provided that suitable land and water frontage for a terminus, with right of way thereto from the said main track, was procured by the corporation of Barrie free of cost to the Railway Company.

2ndly. That such suitable land and water frontage for a terminus, with right of way thereto from the said main track, was procured by the corporation of the said town free of cost to the said Railway Company, and to their satisfaction, at very considerable expense to the said Corporation of Barrie.

3rdly That the said Railway Company did not, nor did the said Northern Railway Company of Canada, at any time since, construct the said branch line, and that the claim of the said Corporation of the town of Barrie to have the same constructed had never been abandoned or given up at any time, but on the contrary had been always since upon all convenient occasions urged and pressed for performance.

4thly That reference being had to the agreement in the said memorandum of agreement, by which the award was to be made as though the several acts of parliament therein referred to had not been passed, he awarded "that the said claim of the corporation of the town of Barrie to have the said agreement performed was still subsisting, and if not performed their right to compensation in lieu thereof ought to be awarded:" and

5thly. As compensation for the non-performance of the said agreement, and in full satisfaction of the said claim of the said Corporation of the town of Barrie against the said Northern Railway Company of Canada in respect thereof as by the said reference he was empowered to do, he thereby awarded, ordered, adjudged and determined, that the said Northern Railway Company of Canada, and their successors, shall and do well and truly pay, or cause to be paid, to the said Corporation of the town of Barrie, or their successors, on the 10th day of March next ensuing the date of the award at the office of, &c., in Toronto, the sum of £5,000 of lawful money of Canada, and that the same be received by the said Corporation of the town of Barrie in full satisfaction and discharge of and for all the said matters in difference to him referred as aforesaid.

6thly And he further awarded that the Northern Railway Company of Canada do, when requested to do so by the said Corporation of the town of Barrie, make and execute to them a valid deed of conveyance in fee of all lands and tenements mentioned and comprised in a certain indenture of bargain and sale made by one John Boon to the said Company, dated the 18th of August, 1855; and should and do further, when so requested as aforesaid make and execute a general release of all claims in respect of the land and right of way conveyed to them, or agreed to be conveyed to them by the several parties over whose lands the said branch line from the main track into the town of Barrie was to pass.

The award then gave directions as to the costs of the reference and award.

Eccles, Q. C., and *Angus Morrison*, during last term shewed cause.

Cameron, Q. C., and *Galt, Q. C.*, supported the rule.

BURNS, J., read the judgment prepared by the late Chief Justice of the court, in which he concurred.

As the reference was by way of compromise, and led to the withdrawing of a bill relating to the matter which was before the legislature, neither party should be countenanced by the court in refusing to abide by the award on account of any objection not really applying to the merits of the matter in dispute. There is no complaint of any improper conduct on the part of the arbitrator; no affidavits are filed; and the defendants have confined themselves to exceptions which they contend shew the award to be invalid on the face of it. If these objections are well founded the defendants can have the advantage of them in resisting performance by whatever means it may be attempted to be enforced, and as the court has always a discretion in declining to set aside an award on application, is not this a case in which the party complaining only on such grounds as he contends are apparent on the face of the award should be left to oppose any remedy for enforcing payment?

But in regard to the objections, it seems to me there is nothing in the first, though the award happens to be so expressed as to leave some appearance of ground for it. We must give a reasonable construction to the award. The arbitrator has found that the company have not yet done what they agreed to do eight years before, though they have been in no way absolved from doing it. The words "if not performed" may, when all is taken together, be understood to mean the same thing as "since it has not been performed." The arbitrator says in effect, "if the company has not made the branch line they should make compensation. they have not made the branch line and therefore I award," &c.

If the company would rather make the branch line than pay the compensation they have it in their power to contend that an option is given to them, and to move to stay proceedings on the award till a certain day, to give them an opportunity to make the branch line. The court could then determine whether they had such an option.

But the arbitrator could have never intended to give an option. "If not performed," he says, "their right" (that is the right of the town) "to compensation in lieu thereof ought to be awarded." "If not performed" may be reasonably taken to mean if they have *hitherto* not performed their undertaking, not if they shall not *hereafter* perform it, for he proceeds immediately to award "compensation for the non-performance of the agreement," thereby deciding that it had not been performed; and he awards that the compensation shall be paid at a certain fixed day little more than two months from the date of the award, and this without any reservation to the Company of a right to make the branch line instead of paying the money. What follows respecting the Company conveying back the land is all consistant with the construction that the £5,000 was positively to be paid.

The third objection seems to be immaterial. It should be assumed that the arbitrator determined that the company having refused to make the line, should not keep the land which had been conveyed to them in the confidence that they would make it It does not appear on the face of the award why the land which Boon had conveyed to the Company should be made over by the Company to the town of Barrie instead of being re-conveyed to Boon, but all that can be said is that the facts which may have made that a just and reasonable direction are not set out in the award, as they need not be. The circumstances may be such as to account satisfactorily for the award in this respect, and we should assume that there were good grounds for it, in the absence of information to the contrary. The town may have paid Boon for the ground, and directed him to convey it to the Company, and if so they should have it back again, since the Company have declined to make use of it for the purpose for which they got it.

It should be assumed that the arbitrator made allowance in his award for the town getting back this land, and thought it just to award the £5,000 after taking that into his consideration. Besides, if the directions respecting Boon's conveying this land to the Corporation of Barrie were on any ground void, the only consequence would be that they would lose the benefit of that direction in their favour, it could interfere with their right to get the compensation awarded.

And so in respect to the fourth objection to that part of the award which directs that the Company shall execute a general release of all claims in respect of the land and right of way conveyed to them or agreed to be conveyed to them by the several parties over whose lands the branch line was to pass. So far as the town is concerned, that release was evidently intended to be something in addition to the pecuniary compensation. If from any defect in that part of the award the direction should fail of its intended effect, that is no reason why they should not be paid the pecuniary compensation awarded. But is there in truth any difficulty as regards that part of the award?

It was a matter on which the arbitrator had a right to give the direction he did, if we suppose that his intention was, that besides paying the £5,000 the Company were to give up the land which they had not applied to the purpose intended. And as to the objection that it is not stated to whom the release is to be given, could not the company release all right of action and claims against the Corporation of Barrie or any other person or persons whomsoever in respect of the land and right of way conveyed to them, or agreed to be conveyed to them by the several parties over whose lands the said branch line was to pass? Besides the release was only to be executed "upon request," which request would point out who it was that requested the release.

As to the sixth objection, it must be assumed that the arbitrator had good grounds on the evidence before him for making the estimate of damages which he did. The court has not the grounds before it and cannot go into the merits. If it were correct to assume that the arbitrator could give no damages beyond what the town had disbursed in acquiring land, then it ought to be assumed that he did so confine himself rather than that he did not.

The damages may be excessive, but that does not appear, and the case must be an outrageous one in that respect before any interference could be justified on such a ground.

It was argued that the Company could not consistently with their charter and the law of the land expend their funds in paying the damages awarded. If that be so it may follow that they cannot be compelled to obey the award, but this is no application to the Corporation for that purpose, but an application by the Company to set aside an award for a reason which, if it be a reason, must have existed at the time of the submission as well as now; and after a compromise had been made, and the application to the legislature withdrawn on the faith of the arbitration which was agreed to, it does not lie in the mouth of the Company to object to the award on the ground that no such compensation could be legally awarded. They cannot at least make it the ground of an active interposition at their instance.

The rule should be discharged with costs.

McLEAN, C. J., having been absent during the argument, gave no judgment.

Rule discharged with costs.

RYERSE v. LYONS.

Lease—Rent payable quarterly in advance—Construction.

The plaintiff sued in covenant for three quarters rent, alleged to be payable by the lease quarterly in advance. Defendant pleaded as to the rent for the last quarter, commencing on the 1st of March, 1861: 1. That before the expiration of the first month of the quarter the plaintiff wrongfully evicted him. 2. That by a provision in the lease in case of the mill demised being accidentally burned the rent was thenceforth to cease, and that it was so burned on the 5th of March, 1861. 3. On equitable grounds, as to the rent subsequent to the 6th of March, 1861, the same provision in the lease, alleging the destruction of the mill by fire before the 6th March.

Held, on demurrer, pleas bad for the rent, being payable in advance, was due on the 1st of March, and nothing which occurred afterwards could divest the plaintiff's right.

DECLARATION, that the plaintiff by deed let to the defendant certain premises specified, for five years from the 1st of September, 1860, at $900 a year payable quarterly in advance, which defendant covenanted to pay, but of which a balance of three quarters was due and unpaid.

Fifth plea, to so much as relates to the plaintiff's claim for rent in respect of one of the three quarters' rent in the declaration mentioned, being the quarter commencing on the 1st of March, 1861, the defendant saith that the said three quarters in the first count mentioned commenced respectively on the first days of September and December 1860, and the 1st of March 1861, and that during the quarter commencing on the day last aforesaid, and before the expiration of the first month of the said quarter, the plaintiff, without the consent and against the will of the defendant, wrongfully entered into and upon the mills and premises in the declaration mentioned, and evicted the defendant from the use and occupation thereof, and kept him so expelled thence hitherto.

Sixth plea, to so much of the declaration as relates to the plaintiff's claim for rent in respect of one of the three quarters in the said first count mentioned, being the quarter commencing on the 1st of March, 1861, the defendant saith that the said three quarters in the said first count mentioned commenced respectively on the first days of September and December, 1860, and the first day of March, 1861, and that it was and is provided and agreed, in and by the said alleged deed, that should the said mills therein and in the said declaration mentioned be destroyed accidentally by fire, and not by neglect or carelessness, then in that case the said rent should thenceforth cease. And the defendant saith that the said mills were on the 5th day of March, 1861, and within six days after the commencement of the said quarter commencing on the first day of March aforesaid, in the year last aforesaid, accidentally destroyed by fire, and not by neglect or carelessness.

Seventh plea, on equitable grounds, as to so much of the declaration as relates to the plaintiff's claim for rent for or in respect of all or any part of the said term in the said first count mentioned subsequent to the 6th of March, 1861, the defendant saith that the said three quarters in the said first count mentioned commenced respectively on the first days of September and December, 1860, and the 1st of March, 1861, and that the plaintiff's claim in said first count includes a claim for rent for and in respect of a period of time subsequent to the said 6th day of March, in the year last aforesaid. And the defendant saith that it was and is provided and agreed in and by said alleged deed, that should the said mills therein and in said declaration mentioned be destroyed accidentally by fire, and not by neglect or carelessness, then and in that case the said rent should thenceforth cease. And the defendant further saith that subsequently to the first day of March, 1861, and before the said 6th day of March, in the year last aforesaid, the said mills were destroyed accidentally by fire, and not by neglect or carelessness.

The plaintiff demurred to each of these pleas.

Robert A. Harrison, for the demurrer, cited *Hopkins* v. *Helmore*, 8 A. & E. 464; *Poole* v. *Tumbridge*, 2 M. & W. 226; *Hume* v. *Peploe*, 8 East 178; *Chanter* v. *Leese*, 4 M. & W. 295, 311; *Clarke* v. *Holford*, 2 C. & K. 540; *Clarke* v. *The Glasgow Assurance Co.*, 1 MacQ Scotch App. Cas. 668; Vin. Abr. Vol. III., "Apportionment;" *Holtzapffel* v. *Baker*, 18 Ves. 115; Bullen & Leake Prec. 373; Chy. Junr. Prec. 351, 352.

Richards, Q. C., contra, cited *Newsome* v. *Graham*, 10 B. & C. 234; *Bennet* v. *Ireland*, E. B. & E. 326.

McLEAN, C. J., delivered the judgment of the court.

It appears to us that all these pleas are bad. The plaintiff is asking for rent *due* to him according to the lease *before* the burning of the *mill*. He was entitled to receive it and could have distrained for it on the first day of March, or he could have sued for it on that day. A right of action was vested in him when default was made in the payment, and being vested nothing which subsequently occurred would divest it except payment. All rent becoming due subsequent to the burning ceased to be payable under the lease, but if such provision had not been inserted the plaintiff could have insisted on his rent being paid quarterly, notwithstanding the destruction of the mill by fire, and the defendant could not protect himself against the payment by pleading that it had been burnt down or injured. He was not to be relieved from payment of rent by any other injury to the mill except burning not from carelessness or neglect. If it had been swept away or rendered useless by a flood, the rent would still be payable, or if the plaintiff were able to prove that the burning was wholly owing to neglect or carelessness—if, for instance, he could shew that the burning was owing to the defendant keeping the ashes from a stove in a box or barrel in the mill—the rent agreed upon could be enforced during the full period of the term.

The pleas do not set out any defence to the suit of the plaintiff, and judgment must be for the demurrer.

Judgment for plaintiff on demurrer.

LEE ET AL v. WOODSIDE.

Assignment—Money had and received.

F had a demand against one T on notes and acceptances of about $20,000. The plaintiffs agreed to transfer to him certain bank stock worth $2,550, as a loan, to secure which he agreed to assign, and afterwards delivered to them, $14,200 of these notes, all of which were negotiable but some only were endorsed by F. T. failed in Lower Canada, and F. obtained these notes from the plaintiffs to collect there for them. F. subsequently executed an assignment to the defendant for the benefit of creditors, including these notes in the schedule attached to it, but stating in the deed that they were held by the plaintiffs as security for their loan. All the money recovered from T. on F.'s whole claim against him (about $300 excepted) came in to the defendant's hands.

Held, that the plaintiffs might recover from the defendant as money had and received to their use, the amount of their loan out of the money received on the notes delivered to them as security; and if the amount paid by T. was paid generally on F.'s whole claim against him, then a sum founded on the proportion of such notes to the whole of T.'s debt.

ACTION for money had and received to the plaintiffs' use.

Plea—Never indebted.

The case was tried at the last Spring Assizes held at Toronto, before *Burns*, J., and the facts appeared to be these:—

On the 1st of June, 1860, D. K. Feehan entered into an agreement with the plaintiffs under seal, the material parts of which to this action were in these words:

"Whereas the parties of the second part" (the plaintiffs) "have agreed to transfer to the party of the first part" (Feehan) "sixty shares of the stock of the Bank of Upper Canada, amounting to the sum of three thousand dollars, as a loan to the said party of the first part. Now these presents witness, that in consideration

of the said transfer of the said stock, the party of the first part covenants with the parties of the second part, that he will assign and transfer to them a debt due to him from Messrs. Thompson & Co., for the sum of fourteen thousand two hundred and ninety dollars, together with all notes, bills, or other evidences of the said debt. To have and to hold to the said parties of the second part as a security for the said stock transferred by the said parties of the second part."

There were provisions about re-transferring bank stock, payment of interest, and principal, &c., not necessary to notice, and the agreement ended with this provision: "And the parties of the second part shall have the right to enforce the said debt of the said Thompson & Co., or compound, compromise, or give time therefor, with the consent of the party of the first part, and on the re-transfer of the said stock, or the payment of the said money, the parties of the second part will re-convey to the party of the first part the said debt of the said Thompson & Co., together with the evidences thereof."

The evidences of the debt due by Thompson & Co. consisted of various promissory notes and acceptances of bills of exchange, some due at the date of the agreement and others not falling due until afterwards. These notes and bills were delivered by Feehan to the plaintiffs. Thompson & Company removed to Lower Canada and there failed. It was admitted in this case that the law of Lower Canada was, in such a case, that such property of Thompson & Co. as remained in their hands, which had been sold by Feehan to them, but not paid for, and could be identified, would be liable for that particular debt, and that the demand of Feehan on production of the security would be there treated as a privileged debt.

On the 19th of October, 1860, Mr. Feehan obtained the notes and acceptances from the plaintiffs, giving them a receipt for them, expressing that it was for the purpose of handing them to a solicitor at Quebec for collection. The courts in Lower Canada dealt with them on the footing that Feehan was collecting them as his own.

The whole demand which Feehan had against the firm of Thompson & Co. consisted of notes and acceptances to the amount of $20,446 52, of which the sum of $14,290 was assigned to the plaintiffs, the remainder having been assigned to other parties, with the exception of $2,123.44, which Mr. Feehan retained in his own hands.

On the 17th of December, 1860, Feehan executed a deed of assignment to the defendants, for the benefit of his, Feehan's creditors, and in the schedule to the deed the notes and acceptances which had been previously delivered to the plaintiffs, and afterwards got from them by Feehan to take them to Lower Canada, were all enumerated, and it was stated that they were held by the plaintiffs as security for an advance of $2550. That sum was the cash value the parties put on the 60 shares of bank stock transferred to Feehan, as the first agreement shewed.

Mr. Feehan was examined as a witness upon the trial of this cause, and stated that when he made the assignment to the defendant, he informed the defendant how the notes and acceptances stood pledged to the plaintiffs. He further stated, that in obtaining the notes and acceptances on the 19th of October, 1860, to present them in Lower Canada, it was only done by him for the purpose of realizing the amount as a privileged debt, in order that the plaintiffs might receive the money when collected. The amount realized in Lower Canada upon the whole debt of $20,446 52, due by Thompson & Co., was $3615 86. Of this sum, $3337 87 found its way into the hands of the defendant, and the residue of the $3615 86 was paid over to other parties. The amount of $3337. 87 was received by Mr, Feehan from his solicitor in Lower Canada in July, 1861; and he said he informed his solicitor there how the matter stood with respect to the plaintiffs, and when the money was received here he wished to pay over to the plaintiffs the proportions due them according to the amount of the notes and acceptances assigned to them, but the defendant would not consent, and contended that he being Feehan's assignee was entitled to the whole money, and that any demand the plaintiffs might have should be presented to him Mr. Feehan stated that he thought the plaintiffs should receive their proportion, and that only the proportion of the $20,446 52, which still belonged to himself, should be paid over to the assignee. The defendant stated that he was acting under the advice of the solicitors of the trust, and insisted he should have the whole money, and it was then paid over to him.

It was admitted the defendant had the money still in his hands unappropriated, and that the plaintiffs had given notice to the defendant of their claim to the money before action brought.

A number of objections were made by the defendant's counsel to the plaintiffs' recovery, which were reserved as grounds of non-suit.

A discrepancy existed as to the amount of notes and acceptances which had been originally given to the plaintiffs, and as to what had been returned from Lower Canada; and there not being time to analyze the matter at the trial, a verdict was taken for the plaintiffs for $3,092.69, subject to be reduced if the calculation was not right.

R. A. Harrison obtained a rule to shew cause why a non-suit should not be entered on the following grounds:—1. That there was no proof of any assignment to the plaintiffs by Feehan of the debt due to Thompson & Co., or any part thereof, but only an agreement to assign. 2. That the plaintiffs were not in law entitled to maintain this action against the defendant, because of the want of privity between the defendant and the plaintiffs. 3 That the plaintiffs were not in law entitled to maintain this action, because of the want of proof of any ascertained sum of money in the hands of the defendant, which could be said to belong exclusively to the plaintiffs. 4. That the plaintiffs' remedy, if any, was in a court of equity, where the rights of all parties concerned could be finally and satisfactorily adjusted 5. That the plaintiffs in respect to the advance to Feehan, were in the same position as other creditors of Feehan, and must with them share rateably under the deed of assignment to the defendant. The rule also asked to reduce the verdict to such sum as the court might find the plaintiffs entitled to, if any.

Cameron, Q C, shewed cause during last term, and cited *Adderley* v *Dixon*, 1 Sim. & St. 607; *Heath* v. *Hall*, 4 Taunt. 326; *Williams* v. *Everett*, 14 East 582; *Poole* v. *Cowan*, 8 L. T. Rep. 385; *Wright* v. *Bell*, 5 Price 325.

R. A. Harrison, contra, cited *Wharton Walker*, 4 B. & C. 163; *Wedlake* v. *Hurley*, 1 Cr. & J. 83; *Stephens* v. *Badcock*, 3 B. & Ad. 355; Trower on Debtor and Creditor, 182; *Jones* v. *Carter*, 8 Q. B. 134; *Great Northern R. W. Co.* v. *Shepherd*, 8 Ex. 30; *Bleaden* v. *Charles*, 7 Bing. 546; *Harvey* v. *Archbold*, 3 B. & C. 626; *Baron* v. *Husband*, 4 B. & Ad. 627.

BURNS, J.—In this case I have to read the judgment prepared by the late Chief Justice of this court, in which I concur.

If the verdict for the plaintiffs should stand, I see there is some doubt suggested as to the correctness of the amount for which it was entered at the trial. This the parties can settle, and in case of any disagreement refer to the court.

I perceive that of the securities handed over by Feehan to the plaintiffs some have been endorsed by him, others (and for the greater part I think) not endorsed.

As to those endorsed by Feehan in blank, and delivered over by him in security to the plaintiffs, how can there be any question that the money collected on them should go to the plaintiffs, at least to the amount of their debt and interest?

As to those not endorsed (all were negotiable), the delivery of them over to the plaintiffs by Feehan, for the purpose of collecting them by the plaintiffs in Feehan's name, as they might be with his assent, would make the money collected upon them the money of the plaintiffs, as between them and Feehan, if Feehan had not made the assignment to defendant which he did make; and if so, then his assigning his debts afterwards to defendant can place the plaintiffs in no worse situation, when the defendant took them, or rather the assignment of them, with written notice that they had been placed in the plaintiffs' hands to secure the sum agreed upon.

It would have made the matter more clear if the securities had all been endorsed, as some were, though probably not for the purpose at the time of transferring them to the plaintiffs

There may be a difficulty in adjusting the amount for which the verdict should be entered, for of course it is only on the moneys that can be held to have been paid by Thompson & Co. on account

of the notes given into the plaintiffs' hands as security for their debt these plaintiffs can have any claim.

And as to those notes, the plaintiffs' right to recover seems to me to be clear, for they cannot be held to have passed under the assignment to defendant, except as to the surplus af.. the plaintiffs' claim. It was evidently the intent, taking the assignment and the schedule together, to provide that the plaintiffs' advances should first be paid out of them, and to give the assignee to understand that there was that prior claim on the proceeds in the plaintiffs' favor, to secure which the plaintiffs held the notes.

I think Feehan's evidence fully supports the plaintiffs' right to the $2,550, so far as it can be shewn to have been collected out of or upon these securities.

If what was collected from Thompson & Co. was collected merely as so much by way of a dividend on their whole debt due, and without any reference to any particular securities (as I suppose it was), then of course a calculation must be made founded on the proportion of the securities held by the plaintiffs to the whole of *Feehan's claim against Thompson & Co.*

McLEAN, J., having been absent during the argument, gave no judgment.

IRWIN v. SAGER ET AL.

Ejectment—Right to try question of boundar —Conflict of opinion

It was held by this court that at a former trial the question of boundary should have been tried in this action of ejectment. The Court of Common Pleas held differently upon the same point in other cases, and the Chief Justice of that court having at a second trial ruled in accordance with their judgment, a new trial was granted without costs.

Ejectment of the west half of lot number 29 in the 3rd concession of Ancaster.

This case came on for trial at the last spring assizes at Hamilton, before Draper, C. J., and the title of the plaintiff to the west half of lot 29, in the third concession of Ancaster being admitted, the defendant offered evidence to prove that the land actually in dispute between him and the plaintiff, though claimed as part of that lot, was not in fact part of it, but part of lot No 28, to which the defendant claimed title. The learned Chief Justice rejected that evidence, holding that under the statute he must treat the appearance as general, for the statute, though providing for a notice limiting the defence, the defence does not provide for a limited appearance; and consequently, as the general defence could not under the admission be sustained, the plaintiff was entitled to a verdict for the whole of the lot sued for; and that he must take possession at his peril of any land not belonging to that lot.

Sadlier obtained a rule *nisi* to set aside the verdict, relying upon the judgment given in this caseafter a former trial, 21 U C Q B. 373, at variance with the decision of Common Pleas in *Lund* v. *Savage*, 12 U. C. C P. 143, in accordance with which the learned Chief Justice ruled at the last trial.

Barton shewed cause.

McLEAN, C. J.—The able judgment of the learned Chief Justice of this court delivered during the last term in this particular case seems to me conclusive as to the question whether or not a disputed boundary can be decided in an action of ejectment, or whether an action of trespass is the only form of action in which such a question can be raised. Before the passing of the Ejectment Act, Consol. Stats. U. C , cap 27, the constant practice was to bring ejectment in any case of disputed boundary, and the premises were so defined that there could be with due care no difficulty in seeing on the face of the proceedings the premises sought to be recovered. It is true the verdict in any such action might be disputed at the instance of either party, and another action might be brought, but the facts disclosed in evidence were generally sufficient to satisfy the parties on which side the right lay; and though in some instances other actions might be brought on the same or different testimony, the disputed boundary might be called in question and disposed of, for the time at all events, in an action of ejectment as satisfactorily as in an action of trespass. I cannot, I confess, see that in changing the mode of proceeding in an action of ejectment, and causing the parties actually contesting to appear as plaintiff and defendant instead of John Doe and Richard Roe, the legislature intended to drive a party, in order to assert a right to a piece of land in dispute, to an action of trespass in the first instance, in which damages only can be recovered, and then to an action of ejectment to recover the land after a recovery in trespass.

The 20th section of the Ejectment Act provides that upon a finding for the claimant judgment may be signed and execution issued for the recovery of possession of the property, or *of such part thereof* as the jury have found the claimant entitled to; and the 12th section provides that any person appearing to a writ may limit his defence to a part only of the property mentioned therein, describing *that part* with reasonable certainty in a notice entitled in the court and cause and signed by him or his attorney; and an appearance without such notice confining the defence to a part shall be deemed an appearance to defend for the whole. I think that these clauses, and the 49th section, as to the effect of a judgment in ejectment, and indeed all the provisions of the act, shew that, though the form of proceeding was changed, the action of ejectment was intended to be the same as it had always been In the case of *Peters* v *Nixon*, 6 U C C. P 451, the learned Chief Justice says that the practice of trying boundaries in actions of ejectment had prevailed too long perhaps to enable the courts by their own authority to put an end to it; but in that case the decision was to discourage (except when bound by well-established rule) the practice of trying questions of boundary by actions of ejectment, the legitimate object of which it declares is to try titles.

The decisions of this court as to the right to try questions of boundary in actions of ejectment, and those of the Common Pleas on the subject, are so much at variance as to leave suitors in doubt as to the law, and in some cases create so much inconvenience and expense to parties that it is extremely desirable that a decision of our highest court should be obtained, but till then I do not feel at liberty to decide that a course of proceeding which I believe has always prevailed in this province shall be no longer continued.

BURNS, J., concurred.

HAGARTY, J., dissented, retaining the opinion expressed by the Court of Common Pleas, of which he was then a member, in *Lund* v. *Savage*, and *Lund* v *Nesbitt*, 12 U. C. C. P., 143.

New trial without costs.

CHANCERY.

(*Reported by* ALEX GRANT, Esq, *Barrister-at-Law Reporter to the Court*)

MASSINGBERD v. MONTAGUE.

Sale for taxes—Sheriff's officer—Duty imposed on sheriff and his officers at sales for taxes—Costs.

At a sale of lands for wild land taxes, one of the sheriff's officers conducted the sale, at which he knocked down without any competition to another officer of the sheriff, a lot of land worth about £350, for rather less than £7 10s., which it was subsequently, with the assent of the sheriff, entered in the sales book in the name of the party who had conducted the sale, for the purpose of enabling the person to whom it had been knocked down to cheat his creditors Upon a bill filed to set aside the deed executed by the sheriff, it was shewn that by arrangement amongst the persons attending the sale, it was understood a lot should be knocked down to each person in turn, in pursuance of which the sale in question was effected. Under these circumstances the court set aside the sale with costs as against the person to whom the conveyance was made.

The duty imposed upon sheriffs at sales of lands for taxes is to sell such portions of the lands offered as the sheriff may consider it most for the advantage of the owners thereof, where therefore a sheriff so neglected his duty in this respect that at a sale for taxes very valuable lots of land were knocked down for trifling amounts of taxes, in pursuance of an agreement to that effect entered into amongst the bidders, some of which lands were purchased by bailiffs in his employ, and with his knowledge, the court in dismissing the bill filed to set aside one of the sales to his bailiff as against the sheriff, refused him his costs It is not sufficient that the sheriff does not participate in such arrangements for his own benefit.

The bill in this cause was filed by the Reverend Hompesh Massingberd, against Charles Montague, William Glass, sheriff of the county of Middlesex, and John Godbold, praying, under the circumstances appearing in the head-note and judgment, to have a sale effected by the defendant Glass, as sheriff, set aside, and plaintiff let in to redeem the lands so sold to the defendant Godbold, on the payment to him of what he had advanced.

The cause came on to be heard before his Lordship the Chancellor.

Roaf, for the plaintiff, referred to *Henry* v. *Burness*. (Grant, vol. 8, p. 345.)

Fitzgerald for defendants.

VANKOUGHNET, C.—This case presents, though perhaps in a less degree than some others, one of those instances of sales of lands for arrears of taxes in which the rights of owners are sacrificed to the cupidity of bidders, who by arrangements among themselves contrive to get, for trifling sums chargeable on the property, whole lots of land, when one-twentieth, and often one-fiftieth part should suffice for payment. It would seem from the facts disclosed in this and other similar cases that persons attending such sales with an intention to purchase, consider it lawful and proper to conspire together to divide between them large quantities of land so exposed to sale; and the officer conducting the sale appears to have considered that he has discharged his duty so long as he does not participate in such an arrangement with a view to his own profit. The law has ever required that those, whose persons or property have been by misfortune or otherwise, subjected to its process, shall be dealt with fairly and without oppression, and with as little suffering and loss as possible, and it throws this duty upon the officer charged with the execution of that process. The statute regulating sales of land for taxes, recognizes and enforces this duty, for it provides that, "the sheriff shall sell by public auction so much of the land as may be sufficient to discharge the taxes, and all lawful charges incurred in and about the sale and the collection of the taxes, selling in preference such part *as he may consider it most for the advantage of the owner to sell first.*" The legislature have not, therefore, been less careful to guard against the sacrifice of property subjected to burdens for the public, than the law has been to protect, against wanton waste and loss, property subjected under judicial process to the claims of individuals. Nor should they have been.

Taxes are at all times onerous, and are imposed merely from public necessity, and it is the policy as well as the interest of the state that they should bear as lightly as possible on individuals, and it is the duty of those charged with the collection of such charges, to maintain this policy so far as is in their power. We know that at common law, if a sheriff sells under execution, unless at the peremptory mandate of the court, the property of a debtor at a price greatly below its value, he is liable to damages in an action for the loss. And in one case, *Phillipps* v. *Bacon*, (9 East. p. 303,) Lord Ellenborough is reported to have said, in reference to an attempt to sustain on the common count for trover a verdict recovered against the sheriff for want of proper care and judgment in the sale of property under a *fi. fa.*, "If the question had arisen as at present advised, I should have inclined very strongly, from the argument I have heard, to have held that if the sheriff, or his officers acting for him, depart so entirely and scandalously from their duty, in making a mock sale of the goods in the manner which has been represented to us, it could not be considered as a sale in obedience to the writ of *fieri facias*, but rather a conspiracy to despoil the plaintiff of his property, and would bring the sale within the principle of the six carpenters' case, and make the sheriff a trespasser *ab initio*."

Now is not such a sale for taxes as I have referred to a mockery, and a conspiracy to deprive the owner of his property? and is the sheriff, in conducting and countenancing such a sale, doing his duty, and acting in the spirit of the statute and of the law? Such a sale, to use a paradox, is no sale. The duty of a sheriff is not to expose lands to it, but to adjourn the time, and then execute the writ, giving all proper notice to ensure the attendance of bidders. A course similar to this he adopts on *fi. fas.*, where he returns "goods on hand for want of bidders." It is not his fault if he cannot secure a fair sale, and thus make the money which he is charged to collect; but it is his fault if he permits an unfair sale, which he has the means of checking or preventing

The writ for these lands is placed in the sheriff's hands, at least three months before the time of the sale, and it is not too much to expect that during that time he shall take some pains to make himself acquainted with the condition and value of the land about to be sold; and the machinery of his office would seem adequate for the purpose at very little trouble or cost. He can hardly excuse himself by total ignorance, when there is imposed upon him the exercise of judgment in selling first that portion of the land which he considers it most for the advantage of the owner to sell.

Now in this case there is much evidence to shew that at periods of the sale, which extended over two or three days, arrangements were made by those present not to compete for particular lots; but there is not the evidence of general combination and of determination to maintain it, which was furnished in the case of *Henry* v. *Burness*. There is abundant proof, on examining the book containing the entries of sale, that whole lots of land were, without any competition, sacrificed for trifling sums, and these too lying in well settled parts of the country, with the average value of which it is hard to believe that persons necessarily well acquainted with the county as the sheriff and his officers must have been, could have been entirely ignorant. Then what do we find in reference to this particular lot? not certainly distinct evidence of any arrangement that there was to be no competition, but we find the sheriff's officer who was conducting the sale, Godbold the defendant, selling it without any competition to another sheriff's officer, Jeffrey, the bailiff; and subsequently, to enable Jeffrey to cheat his creditors, entering in the sales-book, with the assent of the sheriff, the lot as sold to himself; the sale being for less than £7 10s., and the lot worth at least £350. Now can such a transaction stand? These two gentlemen have been too clever. I am not quite certain what the truth in the matter is; but by their own statement, Jeffrey, though he swears he bought for himself, but feared to hold the land in his own name, persuades the sheriff that he bought for Godbold, and gets the sheriff to treat Godbold as the purchaser, to whom, as such, first, the certificate of sale, and afterwards the deed issued from the sheriff. We cannot, after this, allow Mr. Jeffrey or Mr. Godbold to deny that the latter was the purchaser; and as I think he could not sell to himself, the sale and all transactions founded on it must be set aside, and a decree to that effect made, with costs, to be paid by Godbold. Even if the sale were to Jeffrey, and had remained in his name, I should think it an improper one. Considering the duties cast upon the sheriff, and how much he must necessarily rely for information upon his officers and bailiffs, I think none of them should be allowed to purchase at any sale which he in the exercise of his office is called upon to make, and that he should not permit any such purchase. He has the power in his own hands, for if any one of his employees desire to become a purchaser, he can be told by the sheriff that he must first leave his service.

I dismiss the bill as against the sheriff, but without costs, for I cannot hold him free from blame in the matter. He ought not to have allowed the sale to be entered in Godbold's name; neither ought he to have allowed Godbold to become, as he did, the purchaser of several other lots, and the more especially so as he had heard the proposition to allow the auctioneer and his clerk to have a lot or two without opposition.

The amount of taxes paid by Godbold, with ten per cent., up to the filing of the bill, to be re-paid him, or be deducted from the costs.

CHAMBERS.

(*Reported by* ALEX. GRANT, Esq., *Reporter to the Court.*)

CHAPMAN ET AL, JUDGMENT CREDITORS, SHEPHERD AND TILLIE. JUDGMENT DEBTORS, MCDONALD, MOORE AND BELL, GARNISHEES.

C. L. P. Act—Garnishee proceedings—Power to call third party (claimant) before the court.

When it is suggested that the debt sought to be attached belongs to some third person not a party to the suit, there is no provision under our C. L. P. Act for summoning such third party before the court. The law is different under 23 & 24 Vic cap. 125, secs. 29 & 30, in England.

[Chambers, March 18, 1862.]

On the 6th March last, upon the usual affidavit, an attaching order was issued in this cause.

The affidavit stated that the garnishees, McDonald and Moore, were indebted to defendant Tillie in $800, on a promissory note for that amount made by McDonald in favor of Moore, and by him endorsed to defendant Tillie. It also stated that garnishee Bell was indebted to defendant Tillie in $1,200, upon a mortgage for that amount made by Bell to Tillie.

A summons was issued, calling on the garnishees to show cause why they should not severally pay to the judgment creditors the amounts alleged to be due by them to the judgment debtor Tillie.

On the return of the summons, affidavits were filed, showing that the judgment debtor Tillie had, in September 1861, sold and transferred the note he held against McDonald and Moore to one Walter Scott, who sued the note when it became due, and Moore, who was only surety for McDonald, settled the suit with Scott before the attachment; and that Tillie had, in 1861, long before the plaintiffs had any judgment against Shepherd and Tillie, assigned Bell's mortgage to Scott.

The plaintiffs, therefore, asked for permission to file an affidavit stating that the transfer of the note and mortgage to Scott was colorable, and that in truth Scott was only an agent or trustee of the judgment debtor Tillie.

BURNS, J.—The object of asking leave to file this affidavit is, that the garnishees may be compelled to deny their liability to pay Scott. If it be granted, it is argued that the garnishees may protect themselves by applying for an interpleader issue under the Interpleader Act to compel Scott to interplead with the plaintiffs, to determine the question which of the two, Scott or the plaintiffs, are entitled to the proceeds of the securities.

This is an ingenious way of putting the case, but I think it clear that the Legislature never intended to harrass the debtor of the judgment debtor to that extent or in that way.

The claimant of the securities ought to be before the court or judge, and it is clear that no authority exists to bring him before the court unless the Interpleader Act can be used in the way suggested. It would seem very odd first of all to order a *scire facias* to issue upon the garnishees to show cause why they should not pay the debt owing by them, merely with a view that they again in their turn should call upon the plaintiffs and the assignee of the securities to interplead with each other as to who is the proper party to call for payment from the garnishees.

The law is defective with respect to this matter, and in England it has been remedied by the 29th and 30th sections of 25 & 24 Vic. cap. 125, passed 28th August, 1860. Under these sections, whenever it is suggested that the debt sought to be attached belongs to some third person, the judge has power to bring such third person before him, and then may either bar the claim of such person or make any order he shall think fit with respect to the lien or charge, if any, of such person.

Such a provision would be proper to be enacted in this country; but the fact of its having been enacted in England, where the previous law was as ours is now, shows that in such cases as the present the inquiry which the plaintiffs wish in this case could not there previously have been obtained.

I must refuse the application.

VANLUVAN v. TOLAN.

Costs of the day for not proceeding to trial according to notice—Extending Rule.

Where, upon a cause being called on for trial, counsel for plaintiff states he is not ready, and counsel for defendant, though present in court, does not insist upon having the cause struck out or a nonsuit entered, in consequence whereof the cause is passed over, defendant is not entitled to costs of the day.

(Chambers, 13th September, 1862.)

This was an action for slander and malicious prosecution. Notice of trial was served on 29th April last for the then next Spring Assizes, to be holden at Kingston on 9th May last. The record was entered for trial. There were 43 civil cases on the docket. This was number 36. On the afternoon of Saturday, being the second day of the Assizes, there being no business before the court, the presiding judge (Burns) stated his willingness to take any case that was ready, and asked counsel in the different cases if they were ready. The counsel for the plaintiff in this case stated that plaintiff had a number of witnesses in attendance, but that two of his most important witnesses were absent, under the belief that a case so low down on the docket could not be reached on the second day of the assize. The counsel for defendant, though apparently ready, did not insist upon the cause being struck out of the docket or upon having a non-suit entered. The cause was accordingly, like other causes, passed over. On the following Monday cause No. 12 on the docket was proceeded with and not finished till the afternoon of the following Wednesday. The remaining causes on the docket preceding this, together with criminal business, occupied the court till the following Saturday, when the court ended, having disposed of all causes on the docket excepting the two causes preceding this (36) and a few causes following it. The presiding judge refused to make any remarks.

Defendant afterwards, on 28th May last, having filed the usual affidavit obtained the usual rule for costs of the day against plaintiff, he not having proceeded to trial pursuant to notice.

Kingsmill, for plaintiff, in Trinity Term last obtained a rule in the Practice Court calling upon defendant to shew cause why the rule for costs of the day should not be re-cinded

By consent this rule was enlarged before a judge in chambers.

John Patterson shewed cause.

The following cases were cited in argument: *Morgan* v. *Fernyhough*, 11 Ex. 205; *Warne* v. *Hall*, 1 L. T., N. S., 574; *Scott* v. *Crossthwaite*, 6 U. C. L. J., 159.

MORRISON, J., having consulted BURNS, J., made the rule absolute.

IN THE MATTER OF THE CONVICTION OF JAMES SULLIVAN.

Certiorari for removal of Conviction—Practice.

Where it is shewn to a judge in chambers that there is a reasonable doubt as to the legality of a conviction under the Master and Servants Act, the judge will order the issue of a writ of *certiorari* for the removal of the conviction, notwithstanding the confirmation of the conviction by the court of sessions to whom an appeal was made against the legality of the conviction.

(Chambers, September 25th, 1862.)

This was an application for an order authorizing the issue of a writ of *certiorari* for the removal into the Court of Queen's Bench of a conviction alleged to be illegal.

The conviction, which was under the Master and Servants Act, Con. Stat. U. C., cap. 75, was in the following form:—

PROVINCE OF CANADA,
County of Oxford,
TO WIT:

[L. S.]

Be it remembered, that on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-two, complaint was made before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the County of Oxford, for that James Sullivan, of the Town of Woodstock, in the said County of Oxford, hired and employed one Edward Moles as a journeyman or skilled laborer to work for him, the said James Sullivan, at the wheelwright trade or business as such journeyman or skilled laborer, at the said Town of Woodstock, at the wages of eight dollars per week, and that he, the said Edward Moles, did duly work and labor for the said James Sullivan, as such journeyman or skilled laborer, at Woodstock, aforesaid, for the time of ten weeks, at the said wheelwright trade or business, from about the twelfth day of May last past, at the said wages of eight dollars per week; and that the said James Sullivan had not paid and refused to pay the said Edward Moles the sum of fourteen dollars and sixty-eight cents, being the balance of said wages for the said time of ten weeks, due and owing by the said James Sullivan to the said Edward Moles; and now at this date, to wit, on this seventh day of August aforesaid, at Woodstock aforesaid, the parties appeared before me, the said justice, and I, having heard the matter of complaint, did adjourn the said complaint until the eighth day of the said month of August for a further hearing and examination; and on the said eighth day of the month of August, having heard the said complaint and examined the witnesses produced before me, I do order and adjudge the said James Sullivan to pay to the said Edward Moles the sum of fourteen dollars and sixty-eight cents, for a balance found to be due by the said James Sullivan to the said Edward Moles for wages for the service or work so done and performed by the said Edward Moles for the said James Sullivan, the said sum of fourteen dollars and sixty-eight cents to be paid in twenty-one days from and after the said eighth day of the said month of August: and I do further order and adjudge that the said James Sullivan do pay to the said Edward Moles the sum of three dollars and seventy-five cents for his costs in this behalf; and that if the said several sums be not paid on or before the thirtieth day of the said month of August,

I hereby order that the same be levied by distress and sale of the goods and chattels of the said James Sullivan

Given under my hand and seal this eighth day of August in the year of our Lord one thousand eight hundred and sixty-two

(Signed.) GEO. W. WHITEHEAD, J. P.

An appeal was entered to the Sessions for the county of Oxford next after the date of the conviction, and heard on 9th September last. That court confirmed the conviction.

This application was made pursuant to a written notice previously served upon the Chairman of the Court of Quarter Sessions.

It was contended by *Bird*, who appeared in support of the application that the conviction was bad on its face.

1. Because non-payment of wages to a skilled laborer is not such a complaint as can be entertained by a magistrate.

2. Even if so, that a discharge should be ordered as well as the payment of wages.

He also contended that the conviction not having been signed by the magistrate till after its return to Sessions was illegal.

He contended that under any circumstances, the conviction being illegal on its face, he was entitled to the writ.

Jackson shewed cause for the Chairman of the Sessions.

RICHARDS, J.—It may admit of some doubt, if so long a time after the relation of master and servant had ceased the complainant could avail himself of the statute I think the point a reasonable one to raise, and in that view I direct the issue of the writ. Order accordingly.

BLACK V. WESLEY.

Stat. 43 Eliz. cap. 5—Division Court—Certiorari after jury sworn.

Held. That Imperial statute 43 Eliz cap 5, applies to cases in Division Courts, where a jury is empannelled by the judge, and verdict rendered before delivery of writ of *certiorari* to the judge.

Semble. The act in spirit applies to cases where plaintiff's witnesses are sworn, although no jury is called

[Chambers, Sept. 27, 1862.]

The plaintiff brought an action against defendant in the First Division Court of the county of Ontario, to recover the sum of $93, for money paid by plaintiff for the use of defendant. The summons for the commencement of the action issued on the 13th May last On the 2nd June last the cause came up for hearing; and several questions of law having been raised, the further hearing of the cause was adjourned till the 2nd July last. On the 2nd July, the hearing was further postponed till 1st September last. On the 1st September, defendant having made application for an order for the issue of a writ of *certiorari* to remove the cause into the Queen's Bench, obtained the order. On the same day a jury was empannelled by the judge of the Division Court at Whitby, to try certain questions of fact submitted to them by the judge, on which the jury found in favor of plaintiff. On the following day (2nd September), the writ of *certiorari* for the removal of the cause, having been issued, was delivered to the judge of the Division Court. He made a return to the writ, setting forth, among other things, the fact, that before the receipt of the writ by him, a jury had been empannelled in the cause, and rendered a verdict in favor of the plaintiff

Jackson thereupon obtained a summons, calling on the defendant to show cause why the rule for the *certiorari* should not be set aside, and the *certiorari* quashed, and a writ of *procedendo* issue, upon the ground, among others, that the *certiorari* was not delivered to the judge until after the cause had been tried and a verdict rendered. He cited Stat. 43 Eliz. cap. 5; Arch. Prac. 9 Edn. 1244; Tidd's Prac. 9 Edn. 405.

Burns showed cause.

RICHARDS, J.—The statute 43 Elizabeth, chapter 5, provides that no writ sued forth out of any of her Majesty's courts of record at Westminster, to remove any action or plaint, &c., depending in any courts in any city or town, or elsewhere, which have or shall have jurisdiction or authority to hold plea in any action, plaint or suit, shall be received or allowed by the judge or judges, or officer or officers, of the court or courts wherein or to whom any such writ shall be delivered, except that the said writ be delivered to the judge or judges, officer or officers of the said court, before that the jury which is to try the cause in question between the party or parties plaintiffs and the party or parties that sued forth the said writ, &c, have appeared, and one of the said jury sworn to try the said cause.

Here the jury was sworn and gave their verdict on the 1st September, and the *certiorari* was not delivered to the judge till the day following.

It is urged that the jury in this cause was not called by either of the parties, and that their being sworn under such circumstances would not bring the case within the meaning of the statute of Elizabeth.

The mischief intended to be cured by the statute arises when the cause is gone into before the judge alone as well as before a jury; for it enables the defendant, in the language of the statute, "to know what proofs the plaintiffs can make for proving their issue, whereby the defendants that sued forth the writ may have longer time to furnish themselves with some false witnesses to impugn these proofs which the plaintiffs have openly made by their witnesses, which is a great cause of perjury and subornation of perjury."

I think the act in spirit applies to cases where plaintiff's witnesses are sworn, although no jury is called. In this case, however, the jury were sworn and gave their verdict the day before the writ was delivered to the sheriff.

I therefore award a *procedendo*, with costs.

RUSSELL V. WILLIAMS.

Con. Stat. U. C. cap. 19, sec. 61—Division Court—Interpleader issue—Certiorari.

An interpleader issue in a Division Court held not to be within sec. 61 of the Division Court Act, and so not removable by *certiorari*

[Chambers, Sept. 28, 1862.]

On the 20th May last a warrant of execution was issued out of the Division Court of the United Counties of Leeds and Grenville, on a judgment recovered therein by Almeron C. Williams and Hugh Mulvena, against William Egan, directed to and delivered to Martin Weltse, a bailiff of said Division Court. The bailiff, under the warrant, seized certain goods and chattels as being the property of William Egan, but which were claimed by Solomon W. Russell as his property under a chattel mortgage. On the 31st May an interpleader summons issued out of the Division Court, requiring the claimant and the execution creditors to appear before the court on the 1st July last. On the 1st July last the issue was tried, and judgment, upon certain legal questions raised as to the validity of the chattel mortgage, reserved till 1st September last. Between the 1st July and 1st September, the execution creditors, defendants in the issue, applied for and obtained a writ of *certiorari* for the removal of the issue into the Queen's Bench, on the ground that several difficult questions of law had arisen on the trial of the issue

Jackson afterwards obtained a summons calling on the execution creditors to show cause why the order for the *certiorari* should not be set aside, the *certiorari* quashed, and a *procedendo* issue, on the ground, among others, that the issue was not removable by *certiorari*, not being for the recovery of "debt or damages" within the meaning of sec. 61 of Con. Stat. U. C. cap 19 (Division Court Act). He cited *Regina* v. *Doty*, 13 U. C. Q. B. 398.

Stevenson showed cause.

RICHARDS, J., made the summons absolute, and ordered a *procedendo* to issue.

UNITED STATES LAW REPORTS.

WYNKOOP V. WYNKOOP.

A wife has no right or control over the body of her deceased husband: it is the right of the next of kin to the deceased.

Appeal from the decree of the Court of Common Pleas of Schuylkill Co., sitting in Equity

READ, J.—So universal is the right of sepulture, that the common law, as it seems, casts the duty of providing it, and of carrying to the grave, the dead body decently covered, upon the person under whose roof the death takes place; for such persons cannot keep the body unburied, nor do anything which prevents Christian burial; he cannot therefore cast it out, so as to expose the body to violation, or to offend the feelings or endanger the

health of the living; and for the same reason he cannot carry the dead body uncovered to the grave; *Reg.* v. *Stewart*, 12 Adolp & Ellis, 773, 40 E. C. L.. The executor or administrator must bury the deceased in a manner suitable to the estate he leaves behind him, and such funeral expenses are placed, by an Act of Assembly in the first class of preferred debts Where the body is decently and properly buried in an appropriate place, such as a family vault, or burial lot in a churchyard, in or near the neighbourhood of the residence of the decedent, it would seem that all was performed which the law required of the living. The duty of the executor or administrator is over, and also his rights, except in case of an improper interference with the grave, the body, or the grave clothes of the deceased. The claims of society have been entirely satisfied. It is of rare occurrence that any dispute arises after the burial, or that any case has been submitted to a court for its decision. The law of burial, in its relations to the place of interment and the protection of the dead body, was discussed at great length by the Hon. Samuel B. Ruggles, in a very learned report to the Supreme Court of the City of New York, in the matter of the widening of Beekman street, which took away certain vaults for the burial of the dead, and required the disinterment and reinterment in some other place of the dead bodies contained in them. Besides the vaults, the bodies contained in eighty graves, amounting to about one hundred, were all disturbed and removed by the church. In one of the graves lay the body of Moses Sherwood, indicated by a marble head-stone bearing the name of "Sherwood." His daughter, Maria Smith, acting for herself and her sister, and for the descendants of her brothers and sisters, five in all who have died, claimed that the remains of her father be reinterred in separate graves in such suitable locality as she might select, that the existing monument be erected over such grave, and that the necessary expense be defrayed out of the funds in court. The referee was of opinion that the claim should be allowed, and submitted to the court certain conclusions of which the second and third were as follows: "2. That the right to bury a corpse and to preserve its remains, is a legal right which the courts of law will recognize and protect. 3. That such right in the absence of any testamentary disposition, belongs exclusively to the next of kin."

After hearing counsel upon the report, the court confirmed it in all respects, awarding $100 to Maria Smith, as next of kin of Moses Sherwood, directing her with that sum to reinter his remains, and erect at his grave the monument taken in widening the street, and declaring her entitled to the possession of the remains and of the monument for that purpose; 5 Bradford's Reports, Appendix, 503, 502.

Colonel Francis M. Wynkoop died suddenly from an accidental gunshot wound, at his residence Valencia, Schuylkill county, Pennsylvania, on Sunday, the 13th day of September, 1857, and was buried in the course of the week in the burial lot of his mother, Angelina C. Wynkoop, in the Mount Laural Cemetery, belonging to the Rector, Church Wardens and Vestrymen of Trinity Church, Pottsville, in the said borough of Pottsville, with military honors, the deceased having served in Mexico, in command of a volunteer regiment principally raised in Schuylkill county. Some days after his widow took out letters of administration, in Schuylkill county, upon her husband's estate. On the 10th of November, 1858, in pursuance of the orders of his widow, the complainant, an undertaker, called on one of the church wardens for the key of the cemetery, in order to take up and remove the remains of her husband to Laurel Hill Cemetery, near Philadelphia, which was refused in consequence of a notice from the mother and next of kin of the decedent, and in whose lot he was buried

On the 30th of the same month the widow, in her own right and as administratrix, filed a bill in equity in the Court of Common Pleas of Schuylkill County, against Angelina C. Wynkoop, (the mother,) John E. Wynkoop, (a brother,) Anna M. Wynkoop, (a sister,) Thomas J Atwood, and the Rector, Church Wardens and Vestrymen of Trinity Church, Pottsville, praying an injunction commanding the mother and the said corporation to permit the plaintiff and her agents to remove the body of the deceased. Upon the hearing on bill, answers and proofs, the court below decreed that an injunction be issued according to the prayer of the plaintiff against the defendants, from which an appeal was taken by the mother, Angelina C. Wynkoop.

The bill asserts a fixed legal right in the plaintiff in two capacities, 1st, as administratrix, 2nd, as widow. As to the first, the absolute duty to bury terminated with the burial, and no subsequent expenses would be a legal charge upon the estate of the decedent, whether solvent or insolvent. 2. As widow, in this case she would appear to have no rights after the interment Suppose a woman has had three husbands, who have all died leaving her a widow, (3 Rawle, 301.) is she to be burdened with the duty and vested with the charge of their three bodies against the expressed wishes of the blood relations and next of kin of each?

But it is said there was an agreement or promise made by all, or some of the relatives of Colonel Wynkoop to the plaintiff, when she was evidently labouring under great mental excitement, almost amounting to insanity, in order, as it would appear, to restore her to a state of comparative calmness. The appellant, in her answer says, "said complainant asserted that the body of said F. M. Wynkoop should never be buried at all, but that it ever should remain with her. Her nerves were wrought up to the highest state of excitement, and consequently her reason, for the time, was almost shattered." The appellant most positively denies that she ever made any such promise or agreement, and the evidence in the cause does not prove her positive and unqualified assertion to be untrue. This ground therefore fails, and the right of the appellant is founded upon her position as mother and next of kin. Besides the fact that the body of her son is deposited in her burial place in consecrated ground, and that he was buried with the ceremonies of the church and with the honours of war, is sufficient to justify us in refusing permission to a removal under the circumstances.

We do not think the present case calls for the interference of a court of equity, and therefore,

It is ordered, adjudged and decreed, that the decree of the Common Pleas of Schuylkill County be reversed, and the bill be dismissed.

GENERAL CORRESPONDENCE.

Master and servant—Con. Stat. U.C. cap. 75, sec. 12—Admissibility of testimony of servant—Return of conviction.

Newcastle, September 22, 1862.

To the Editors of the Law Journal.

Dear Sirs,—Your opinion on the following points will oblige.

A servant sues his master, before a Justice of the Peace, for non-payment of wages, under s. 12, Con. Stats. U. C. c. 75.

On the trial, is the servant, or in other words the plaintiff, a competent witness?

And in case of an appeal, is the Justice obliged to return his conviction to the Sessions?

I ask your opinion with no view of benefitting myself in any matter now in my hands, for I have none; but simply as a matter of general interest, on which different opinions are entertained. Yours truly,

Inquirer.

[Our correspondent puts two questions, both of which are of much general interest. We therefore answer them.

I. The first depends upon the effect to be given to Con. Stat. U. C. cap. 75, sec. 12, read in connection with Con. Stat. U. C. cap. 32, sec. 35 We can find no authority in point. In the absence of such, we can do no more than express our

opinion on the question submitted. We look upon the proceeding under sec. 12, cap. 75, Con. Stat. U. C., more in the nature of a civil than a criminal proceeding. Still, we are not prepared to say that for this reason the testimony of the servant should be excluded. It is clearly admissible under sec. 3 of Con. Stat. U. C. cap. 32, which enacts that "No person offered as a witness shall, by reason of *interest*, be excluded from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising on any suit, action or *proceeding*, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, *magistrate*, or person, having, by law or by consent of parties, authority to hear, receive and examine evidence." The only question is, whether it comes within the exceptions stated in sec. 5 of the same act. It is declared by sec. 5, that the act shall not render competent, or authorize or permit, 1st, any party to any suit or proceeding *individually named on the record*; 2nd, any claimant or tenant of premises, sought to be recovered in ejectment; 3rd, the landlord or other person, in whose right any defendant in replevin may take cognizance; 4th, any person on whose immediate or individual behalf any action may be brought or defended, either wholly or in part; 5th, or the husband or wife of any such party; to be called as a witness on behalf of such party.

If the proceeding under sec. 12 of Con. Stat. U. C. cap. 75, comes within any of these exceptions, it must be the first. That, however, does not exclude the testimony of every party to every proceeding, but only the testimony of a party "individually named on the record." We construe these words to mean that the restriction applies only where there is a record, in which the party can be or is named. There is no record on a proceeding before a magistrate under sec. 12 of Con. Stat. U. C. cap. 75. So that after the best consideration we have been able to give the matter, we think the testimony is admissible.

This conclusion is strengthened, 1st, by a reference to the language of sec. 12 of Con. Stat. U. C. cap. 75, which enacts that "any one or more of such Justices, upon oath of any such servant or labourer, against his master or employer, concerning any misusage, &c., may summon, &c.," clearly intending that the oath of the servant for the purpose expressed, if not for all the purposes of the section, is admissible evidence; 2nd, by universal practice. We know of no case in which such testimony has been excluded. We know that it has been received in every proceeding of the kind, of which we have any knowledge. We know that in one reported case, where the testimony appears to have been received without objection, the servant was afterwards prosecuted for perjury (See *Regina* v. *Walker*, 21 U. C. Q. B. 34.)

II. The second question may be answered much more briefly than the first. Our answer is in the negative. The question is so decided in *Ranney qui tam* v. *Jones*, 21 U. C. Q. B. 370. An order under sec. 12 of Con. Stat. U. C. cap. 75, is there held not to be a conviction within the meaning of Con. Stat. U. C. cap. 124, sec. 1.—Eds. L. J.]

REPERTORY.

COMMON LAW.

Q.B. BARTLETT v. WELLS. *Jan.* 17.

Pleading—Departure—Replication on equitable grounds—Fraudulent misrepresentation by Infant.

A Fraudulent representation by an Infant that he was of full age, whereby the plaintiff was induced to contract with him, cannot be pleaded as a replication on equitable grounds to plea of infancy to an action for goods supplied.

C.P. DAWSON v. HARRIS. *Jan.* 21.

Costs—New Trial—Costs to abide the event.

In an action upon a declaration containing counts for wrongful dismissal, and also a common count for work and labour, a verdict was found for the plaintiff on the special counts, and for the defendant on the common count. A new trial having been granted, the costs of the first trial to abide the event of the cause, a verdict was found for the defendant on the special counts, and for the plaintiff on the common count.

Held, that the plaintiff was not entitled to the costs of the first trial, on the ground that the cause, the event of which the costs were ordered to abide, sequified the cause of action, in respect of which the rule was obtained by the defendant, and upon which he was successful in the second trial.

C. P. HAMMACK v. WHITE. Jan. 14.

9 & 10 *Vic. cap.* 93—*Negligence, prima facie evidence of.*

A. bought a horse at a public auction, and on the following day when riding it in the public streets, it ran away, and, rushing on to the pavement, knocked a man down, who died from the effects of the injuries he received. In an action by the widow,

Held, that neither the fact of defendant being on the pavement, nor that of his riding in the public streets a strange horse, which he had only bought the previous day, were *prima facie* evidence of negligence.

C. C. R. REGINA v. BAIN. *Jan.* 18

Misdemeanor—Attempt to commit a felony.

The prisoner was indicted for breaking and entering a shop, with intent to commit felony, which, by 24 & 25 Vic. cap. 96, sec. 57, is made felony. He was seen upon the roof, where a hole was found broken in; but there was no evidence of his having entered the building.

The jury were directed that if they thought he broke the roof with intent to enter the shop and steal, they might find him guilty of misdemeanor in attempting to commit that felony, and they found him guilty of the misdemeanor.

Held, that the conviction was right.

C. C. R. REGINA v. STANBURY. *Jan.* 18.

False pretences—Venue.

The venue, in an indictment for obtaining sheep by false pretences, was laid in county E., where the prisoner was convicted. It appeared that the sheep had been obtained by the prisoner in county M., and that he conveyed them into county E., where he was apprehended.

Held, that he had been indicted in a wrong county.

EX. ANCONA v. MARKS. *Jan.* 13.

Bill of exchange—Holder—Agency—Ratification of acts of agent.

A., the real owner of a bill of exchange, endorsed it in blank, and delivered it to an attorney for the purpose of his bringing an action upon it in the name of B. B. was not aware of the trans-

action at the time, but on a previous occasion had authorized the attorney to bring a similar action. After action brought, B. ratified the proceedings

Held, that the former authority of B. to the attorney; that the delivery of the bill endorsed in blank, and therefore payable to bearer, to the agent of B, and B's subsequent assent to the action, constituted B. the holder of the bill, and enabled him to sue; and that the ratification was equally good before or after action brought.

EX. MILNE AND ANOTHER v. LEISTER. *Jan.* 17.

Evidence—Admissibility of letter to third party as part of the res gestæ—Objection that can be taken only at the trial.

The buyer bought goods of the seller, and gave B. as a reference to his (the buyer's) trustworthiness. On the issue, whether the buyer bought the goods on his own account or on account of G. & Co.,

Held, that a letter from the sellers to their agent, directing him to make inquiries of B. concerning the buyer, and stating that they (the sellers) had sold the goods an account of G. & Co., was, as part of the *res gestæ*, between the buyer and the sellers, admissible to prove that the sellers sold on account of G. & Co., and not of the buyer.

An objection to the admissibility of a document on the ground of a defect which might have been remedied at the trial, can only be taken at the trial.

EX. C. WHITMORE v. SMITH. *Nov.* 30. *Dec.* 1-2.

Award—Plea—Nul tiel agard—Misconduct of Arbitrators.

The reference was to two arbitrators; and it was agreed by the parties that, in case of any difficulty arising, the arbitrators might take the opinion of B. Difficulties did arise, and the arbitrators, without disclosing the difficulties to B., agreed to take his advice and adopt his opinion, which they did, and awarded accordingly.

The award was valid in form, and purported to be made by the arbitrators upon all the matters in difference referred to them.

Held, reversing the judgment of the Court of Exchequer, that whether or no the award was liable to be set aside, on the ground of misconduct by the arbitrators, yet that such defence was not admissible under a plea of *nul tiel agard*.

EX. BARTHOLOMEW v. HILL. *Jan.* 16.

Bill of Exchange—Notice of dishonor, waiver on admission of.

A promise to pay the amount of a bill of exchange made to a person applying on behalf of the holder, is evidedce of an admission of notice of dishonor.

Q. B. BEYN v. BURNESS.

Charter party—Condition-precedent—Independent stipulation.

A Charter party commenced in the following terms "It is this day agreed between A. B., Esq, owner of the vessel *Martaban*, of 420 tons or thereabouts, now in the port of Amsterdam, and J. B." (the charterer), &c.

Held, that the words "now in the port of Amsterdam," did not constitute a statement, the truth of which was a condition-precedent to the liability of the charterer for the non-performance of the contract to load, &c.

EX. CROFT v. STEVENS. *Jan.* 16.

Libel—Privileged communication.

The defendant, hearing that a tradesman had been hoaxed by a letter written in his name, and ordering a certain article, wrote to the tradesman (in answer to an application from him) a letter, to the effect that, in his opinion, the letter was written by the plaintiff. It turned out that it was not; but the jury found that the defendant sincerely believed that it was.

Held, that even if the letter was a libel (which was doubtful) it was a privileged communication.

EX. BROMLEY v. JOHNSON. *Jan.* 22.

Contract—Parol—Reduction into writing—Evidence.

When, after a parol contract, before the parties separate, one asks that he may have a note of it, which purports to contain the contract, and does contain all the essential elements of it, the latter must be taken to contain the terms of the contract, and the previous parol contract cannot be referred to.

EX. EDMONDSON v. THOMPSON AND ANOTHER. *Nov.* 14.

Partnership—Liability of apparent partner—Acts as manager and as partner.

A person having advanced money to a trader under an agreement for a share of the profits, not *per se* creating a partnership, and having appeared in the business, doing acts which might well be done either as partner or as manager, but in no other way holding himself out as a partner, although so held out without his knowledge by the trader.

Held, not liable as partner for goods supplied for the purposes of the business, even on his own orders, signed in the name, style and form used by the trader.

EX. DICKENSON (by next friend) v. JACOBS. *Jan.* 15.

Attorney and client—Negligence—Attorney paying costs of setting aside proceedings.

The court will not, on a summary application, order an attorney to pay the costs of setting aside proceedings for irregularity, even where he has admitted that it was owing to his error, and has promised to pay unless there is clear evidence of the nature of the negligence, and that it was gross.

Q. B. JACKSON v. EVERETT. *Jan.* 20.

Costs—Judgment—Action on certificate—43 Geo. III. cap. 46, s. 4.

By the above statute it is provided that in all actions upon any judgment recovered, the plaintiff shall not, in such action on such judgment recovered be entitled to any costs, unless the court in which the action is brought, or a judge thereof, shall otherwise order.

In an action on a judgment, with a count for other causes of action, the plaintiff may recover costs without an order of the court or a judge.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

IGNATIUS KARMAN, of Formosa, Gentleman, to be a Notary Public for Upper Canada. (Gazetted September 6, 1862.)

RICHARD LOW BENSON, of Port Hope, Esquire, Barrister-at-Law, to be a Notary Public for U. Canada. (Gazetted Sept. 13, 1862.)

HENRY ROBERTSON, of Collingwood, Esquire, to be a Notary Public for Upper Canada (Gazetted September 13, 1862.)

CORONERS.

WILLIAM HENRY DALTON, of the Township of Albion, Esquire, M.D., to be an Associate Coroner for the United Counties of York and Peel. (Gazetted September 6, 1862.)

PHIPS LLOYD, of Bobcaygeon, Esquire, M.D., to be a Coroner for the United Counties of Peterborough and Victoria. (Gazetted September 13, 1862.)

TO CORRESPONDENTS.

GEORGE MORRISON—Under "Division Courts."

INQUIRER—Under "General Correspondence."